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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DARRYL COVINGTON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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36 pp

QUESTION PRESENTED

Whether private, for-profit attorneys, who prevail in federal fee-shifting litigation, may be awarded hourly rates which exceed the rates they have ever charged their fee-paying clients and the rates charged by comparable counsel in similar litigation even though *Blum v. Stenson*, 465 U.S. 886 (1984), and *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), require that hourly rates awarded under federal fee-shifting statutes reflect market rates and bar contingency enhancements.

PARTIES

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit in an appeal in which three cases in the United States District Court for the District of Columbia were consolidated: *Covington v. District of Columbia*, Civil Action No. 87-2658; *Sexcius v. District of Columbia*, Civil Action No. 88-2104; and *Galloway v. The Superior Court, Civil Action No. 91-0644*. The parties in this Court are as follows:

Covington. Petitioners, who were the original defendants below, are: District of Columbia, Raymond Barnes, James Bryant, Philip D. Bullock, Leslie C. Childs, David P. Dalton, Herbert H. King, Robert Newkirk, Mario L. Randle, George M. Cutler, Roland J. Jackson, Reginald Nickens, Frederick Shuler, Lavel D. Johnson, Dana Marshall, Luay A. Sese-Khalid, and Rita Goodall. Respondents, who were plaintiffs below, are: Darryl Covington, Tracy Dew-Bey, David Edwards, Lee Roy Ferguson, Raymond Gant, Charles Harris, Donald Hunt, Larry Lee, Leo Wright, and Charles Barber.

Sexcius. Petitioners, who were defendants below, are the District of Columbia; its Mayor, Marion Barry, as successor to Sharon Pratt Kelly; the District of Columbia Board of Education and its Superintendent, Dr. Andrew E. Jenkins III, as successor to Dr. Franklin L. Smith; Lucille E. Christian; and Mary B. Hendrick. Respondents, who were plaintiffs below, are Sheriel L. Sexcius and William F. Edmead.

Galloway. Petitioners, who were defendants below, are the District of Columbia Courts; the Superior Court of the District of Columbia; Ulysses B. Hammond, in his official capacity; the Board of Judges of the District of Columbia; Eugene N. Hamilton, as successor to Fred B. Ugast; Ray Wynn, in his official capacity; and the District of Columbia. Respondent, who was the plaintiff below, is Donald Galloway. The United States appeared in the United States District Court as *amicus curiae*.

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IN THE SUPREME COURT OF THE UNITED STATES

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

The District of Columbia and several of its officials and employees petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1-27), in an appeal in which the court consolidated three cases, is reported at 57 F.3d 1101. Two of the three decisions of the United States District Court for the District of Columbia it reviewed are reported: *Covington v. District of Columbia*, 839 F. Supp. 894 (D.D.C. 1993) (App. 28-51), and *Sexcius v. District of Columbia*, 839 F. Supp. 919 (D.D.C. 1993) (App. 52-75). The third, *Galloway v. The Superior Court for the District of Columbia*, Civil Action No. 91-0644 (D.D.C. Apr. 21, 1994) (App. 76-81), is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

JURISDICTION

The D.C. Circuit entered its original judgment on June 23, 1995. The District of Columbia filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on September 12, 1995. App. 82 & 83. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1988 and the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b). 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of section[] 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Section 794a(b) of the Rehabilitation Act provides in pertinent part:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

I. INTRODUCTION.

The cases before this Court all involve fee awards to private, for-profit practitioners under federal fee-shifting statutes. In each of the cases, counsel sought, and received, fees at hourly rates in excess, and usually substantially in excess, of the rates charged to their clients in these cases and of any rate they had ever commanded in the marketplace. They received these rates even though this Court has ruled that attorneys must be paid at market rates when

they prevail in federal fee-shifting litigation and that market-based fees may not be enhanced because a case has been taken on a contingent basis in whole or in part.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court ruled that not-for-profit legal organizations which successfully represent clients under federal fee-shifting statutes must be compensated at the prevailing market rates for their services. At the same time, however, this Court recognized that "there is no such thing as a prevailing market rate for the service of lawyers in a particular community." *Id.* at 895 n.11. On the contrary, "[t]he type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively -- even within a law firm," and "[a]ccordingly, the hourly rates of lawyers in private practice also vary widely." *Id.* This Court also placed on fee applicants the burden of demonstrating the market rate or rates to which their counsel are entitled.

In *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) ("*SOCM*"), the D.C. Circuit extended *Blum* to attorneys who practice for profit but who take public-interest, or federal fee-shifting, cases on a reduced-fee basis. It ruled that such attorneys should be paid "at rates commensurate with prevailing community standards of attorneys of *like expertise* doing the *same sort of work* in the *same area*." *Id.* at 1521 (emphasis added). In so ruling, the court expressly disclaimed that it intended to adopt a rule "that all attorneys be remunerated at the same rate, regardless of their competence, experience, and marketability," and stated that it intended only "to provide that their experience, competence, and marketability will be reflected in the rate at which they are in fact remunerated." *Id.* at 1521 n.4.

Four years later, this Court ruled that contingency enhancements are not available under federal fee-shifting statutes and that, in the absence of extraordinary circumstances, a fee award must be limited to a lodestar award -- an award calculated by multiplying the reasonable number of hours spent on a case by a reasonable hourly rate. *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

With the demise of contingency enhancements, counsel for prevailing plaintiffs in the District of Columbia routinely began to argue that the hourly rates which they charged their fee-paying clients, and which they previously had sought in their lodestar awards, were below-market and thus not reasonable. *See, e.g., Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1568-69 (D.C. Cir. 1993) (abandoning argument for a contingency enhancement in light of *Dague* and urging for the first time on appeal that the hourly rate the attorney ordinarily charged his clients and sought at the trial level was a below-market rate).

In the three cases before this Court, the highest hourly rates ever charged by lead counsel were $150.00, $187.50, and $200.00, yet each requested, and received, $260.00 per hour. The courts below accepted counsels' representations that even the highest hourly rates they agreed to accept from paying clients in the marketplace, whether in fee-shifting or non-fee-shifting cases, were below-market rates. The principal basis for these awards is a pre-*Blum* attorney-fee matrix, known as the *Laffey* matrix.

These awards are fundamentally flawed. First, the courts below have created presumptive market rates based on data for the entire District of Columbia Bar -- the *Laffey* matrix -- that would not even support an inference that these rates are reasonable rates for the attorneys here. In the process, the courts below have impermissibly shifted the burden of proof for establishing reasonable hourly rates from fee applicants to defendants. Second, in awarding hourly rates that exceed the rates charged both by prevailing counsel to their fee-paying clients here and in other cases, and by counsel with comparable experience, skill, and reputation in similar cases, the courts below have approved above-market hourly rates. Such rates are not authorized by *Blum* and are indistinguishable from the contingency enhancements condemned in *Dague*. Not surprisingly, the panel majority's decision here is in conflict with other Circuits interpreting *Blum* and *Dague*. Review is necessary to resolve the D.C. Circuit's conflicts with the decisions of this Court and other Circuits, as well as to resolve other conflicts among the Circuits concerning the meaning of *Blum*.

II. THE *LAFFEY* MATRIX.

The key to understanding the decisions below is the *Laffey* matrix. The *Laffey* matrix was developed in the early 1980's in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), to determine what hourly rates would be reasonable for the successful plaintiffs' counsel in that case. Three aspects of the matrix are important here -- its structure, purpose, and validity.

Structure. The *Laffey* matrix established hourly rates for attorneys based solely on the number of years they have been in practice; divided them into five experience groups; and assigned to each group a *single* hourly rate as the market rate. *Id.* at 371. The *Laffey* matrix has been updated. Under the latest figures in the record (App. 39-40), those for 1992-1993, the hourly rates assigned to each experience group are as follows:

Years of Experience	*Rate*
20+ - very experienced federal litigators	$300.00
11 to 19 - experienced federal litigators	$260.00
8 to 10 - experienced litigators	$225.00
4 to 7 - senior associates	$175.00
1 to 3 - junior associates	$130.00

Purpose. The *Laffey* matrix was developed to help determine reasonable hourly rates for several attorneys of superior skill and expertise who had litigated to a very successful conclusion a complex Title VII class action. In *Laffey*, 25 affidavits were submitted on behalf of plaintiffs' counsel by "an impressive array of legal personages" attesting "to the actual rates charged by lawyers at some of the most prestigious law firms in Washington, D.C.; . . . the complexity and significance of *Laffey*; and the experience, expertise and sterling reputation of Plaintiffs' counsel." 572 F. Supp. at 367 & 367 n.24. Thus, the assumptions built into the matrix are clear: it was designed to reflect rates paid to attorneys of "extraordinary experience and expertise" engaged in very com-

plex and successful litigation. *Id.* at 374. Indeed, in *Laffey* itself, the district court recognized the special nature of the matrix and refused to apply it mechanically. Thus, it reduced the "generous" *Laffey*-matrix rates by *one-third* in awarding fees to one attorney because he did not have the superior skills and expertise of lead counsel, even though it expressed no dissatisfaction with his performance. *Id.* at 374; *see id.* at 375 n.37.

Validity. The assumptions underlying the matrix were not litigated. The defendant in *Laffey* did not dispute that plaintiffs' lead counsel was "'one of the premier employment discrimination firms in the country'" or that the matrix was "an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." *Id.* at 372 (internal quotations omitted). As a result, the validity of *Laffey's* sample of rates and the methodology used to select the *Laffey*-matrix rates was not proven, even for the limited purpose for which the matrix was devised.

There is only one other important matter to be noted about the *Laffey* matrix -- it has been "updated" in two different ways. One "update" has been based on information provided from time to time by various members of the private bar in the District of Columbia. App. 7. The other "update" has been based on the Consumer Price Index by the U.S. Attorney's Office in the District and is used to establish a rate ceiling in settlement negotiations. App. 8 n.14.[1]

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[1]James R. Layton, an Assistant U.S. Attorney for the District of Columbia, who prepared that matrix, explained that the rates in the matrix are often higher than those charged by attorneys to their clients and that the office uses the matrix as a cap:

> I . . . have compared the rates given in the matrix to rates given in affidavits submitted by attorneys in support of fee applications as those applied by attorneys to their paying clients, and have determined that most, although not all, such rates are at or below the rate shown in the matrix.

(continued...)

III. The District Courts' Decisions.

A. *Their Common Threads.*

In awarding fees in the cases before this Court, the district courts adopted the principle that all attorneys who are engaged in a for-profit practice, but who charge hourly rates in "public-interest" (*i.e.*, fee-shifting) cases that are less than *Laffey*-matrix rates, are charging below-market rates and must be compensated at *Laffey*-matrix rates. According to these courts, plaintiffs met their burden of establishing reasonable hourly rates by introducing (1) the *Laffey* matrix, as updated by the private bar, and (2) the U.S. Attorney's Office *Laffey*-based matrix. The courts so ruled even though they recognized the crudeness of these matrices. App. 36, 60, & 78 n.1.

These courts found unpersuasive the District's evidence, drawn mostly from federal court cases against it. This evidence showed that seven experienced (11-19 years) or very experienced (20+ years) plaintiffs' attorneys with practices similar to lead counsel here were charging hourly rates of $125.00 to $150.00 to their fee-paying clients. App. 36.[2] The District's evidence also included

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[1](...continued)

> . . . We do not, in settling cases, allow counsel to recover at rates in excess of those shown in the matrix.

J.A. (II)87 (emphasis added). References to "J.A." in this Petition are references to the Joint Appendix filed in the court of appeals in this case.

[2]This evidence, showing the actual rates charged by counsel in cases similar to those before the Court and the applicable *Laffey*-matrix rates, may be illustrated as follows:

(continued...)

telling affidavits filed by two of the key players in the contingency-enhancement litigation in the D.C. Circuit, Robert Adler and Joel Bennett. Neither of them ever suggested during that litigation that the hourly rate they were charging clients, and seeking in their fee applications, was a reduced, or below-market, rate, even though their then-current rate of $135.00 was far below the then-applicable *Laffey* rates of $200.00-$210.00.

On the contrary, Mr. Bennett's 1987 affidavit in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), stated:

> *My current minimum hourly rate in all cases, including employment discrimination, is $135.00 per hour. . . . At one time I did accept employment discrimination clients based on a reduced rate* with the intent of recovering court awarded fees based on my full rate if I prevailed, *but I stopped this practice in 1981.*

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[2](...continued)

Year	*Attorney*	*Experience (Years)*	*Hourly Rate*	*Laffey Rate*
1987	R. A. Adler	19	$135.00	$200.00/210.00
1987	J. P. Bennett	14+	$135.00	$200.00/210.00
1990	R. L. Bell	10+	$150.00	$230.00/240.00
1991	G. H. Simpson	18	$125.00	$240.00/250.00
1992	T. F. Fay	25	$144.00	$290.00/300.00
1992	J. J. McCarthy	13	$150.00	$250.00/260.00
1992	C. S. Steel	15	$150.00	$250.00/260.00
1992	J. P. Hart	20	$150.00	$290.00/300.00
1992	J. Harvill	18	$150.00	$250.00/260.00

Two figures are shown in the last column because the *Laffey* matrix is set up on a June 1 to May 31 time frame. Therefore, the rate for any experience group differs depending on whether fees are sought in the first or the second half of any calendar year.

J.A. (I)232 (emphasis added). Mr. Adler's fee application in *King v. Palmer*[3] also confirmed that an hourly rate of $135.00 for experienced attorneys in employment discrimination cases in 1987 was a market rate. Mr. Adler stated that this rate was the rate "charged to all clients of the firm who were billed on an hourly basis" and the rate "regularly charged by counsel for performing similar work in private representation." J.A. (I)269. Furthermore, Mr. Adler stated that this rate fell "*within the rates charged by other firms for similar work in the same community.*" J.A. (I)269 (emphasis added) (internal quotation marks omitted). In other words, in pre-*Dague* fee litigation, experienced counsel in the District doing the same kind of work as counsel here did not regard their below-*Laffey*-matrix rates as reduced, or below-market, rates.

B. *Covington.*[4]

This was a prisoner-rights case taken on a wholly contingent-fee basis in which a fee award was sought under 42 U.S.C. § 1988. Lead counsel were Daniel M. Schember and Michael J. Gaffney of Gaffney & Schember, P.C., a firm which has a "general litigation practice," including "various federal administrative proceedings." J.A.(I)159. In support of their fee request, counsel submitted a modestly detailed application. It included declarations by Messrs. Schember and Gaffney in which they averred that they have concentrated their practices as plaintiffs' lawyers in employment, civil rights, and similar cases.

Importantly, their declarations demonstrated that they have responded to market conditions by charging rates below those charged by large firms and by maintaining fairly constant rates over

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[3]950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied sub nom., King v. Ridley*, 112 S. Ct. 3054 (1992).

[4]The District limits its factual presentation to lead counsel in each of these cases. However, the *Laffey* matrix was used to set rates for all other counsel and paralegals except in those circumstances in which *Laffey*-matrix rates inexplicably were not sought.

the years. Thus, Mr. Gaffney, a 1975 law school graduate, charged a range of hourly rates as late as 1992 as follows: $50.00, $100.00, $120.00, 125.00, $140.00, and $150.00; and Mr. Schember, a 1974 law school graduate, charged rates of $125.00 and $150.00 in 1992 (and a range of lower rates in earlier years). J.A. (I)170-71. From 1986 to June, 1990, their top hourly rate was $125.00; and from June, 1990, to the time they filed their fee application in December, 1992, their top hourly rate was $150.00. J.A. (I)171.

Despite their own evidence of the rates they can command in the marketplace, these attorneys requested that the District be required to pay them at *Laffey*-matrix hourly rates, or $260.00. App. 39-40. The reason for seeking greater remuneration from the District than they charged their clients was summarized by Mr. Schember as follows:

> . . . [O]ur firm has historically been, and continues to be, a quasi public interest firm whose attorneys practice privately and for profit, but at below-market rates reflecting non-economic goals. We have customarily charged below the prevailing market rate to accommodate our clients' limited means and the importance of their cases.

J.A. (I)159.

In granting their request, the Honorable Royce C. Lamberth stated that "[t]he most difficult issue . . . is establishing the reasonable hourly rate." App. 31; see also App. 39. He explained that his task was to "determine the 'prevailing market rates in the relevant community,' and award counsel that as the reasonable hourly rate" because, "[i]n the D.C. Circuit, this . . . method . . . is . . . used to determine the attorney's fees owed to 'privately practicing but public interest motivated attorneys who intentionally charge their poorer clients reduced rates.'" App. 32. He concluded that the firm was entitled to *Laffey*-matrix rates because *the District of Columbia* had failed to "produce[] enough evidence that plaintiffs' counsels' ordinary billing rates -- about $150 per hour -- are not below market value." App. 32.

His decision turned on two inquiries: the definition of the relevant market and the determination of the prevailing hourly rate in that market. The District urged that the relevant market be defined as attorneys who file civil rights, employment discrimination, and similar suits, while plaintiffs urged a market composed of attorneys who are involved in complex federal litigation. App. 33. Judge Lamberth analyzed the issue as follows:

> *[The District's] position may be plausible*. . . . [T]he legislative history of § 1988 and subsequent Supreme Court and District of Columbia circuit caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), *courts must aim to award attorney's fees that mirror what counsel would earn in the market.* If the market would provide different sub-markets of lawyers different rates, courts properly aiming to mirror the market would award lawyers in each sub-market the fees that their particular services command in the marketplace.

App. 33-34 (emphasis added) (footnotes omitted).

Judge Lamberth nevertheless accepted "plaintiffs' *theory* that the relevant market should be very broadly defined . . .." App. 38-39 (emphasis added). *The District* had failed to "produce[] enough evidence . . . that the prevailing rate in the sub-market . . . is . . . lower than the rate prevailing in the broader legal market." App. 35. By contrast, plaintiffs had met their burden of defining the relevant market by introducing the two updated *Laffey* matrices. App. 35-36; see also App. 39-40. Judge Lamberth so ruled even though he recognized that the District's criticisms of these matrices -- that they "*represent[] only a small percentage of the District of Columbia's Bar, and . . . omit[] the 'lower end of the market' of legal services -- may have merit* . . .." App. 36 (emphasis added).

Judge Lamberth explained:

> For their own part, *defendants have not presented persuasive evidence* that the fees earned by plaintiffs' lawyers in the sub-market of civil rights, employment, and discrimination litigation are lower than the fees earned in the broader market of complicated federal litigation. . . . For example, . . . [their] affidavit cites only seven instances in which lawyers with 10-20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. . . . These seven instances look suspiciously representative of only the lower end of the sub-market. . . . *Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market.*

App. 36-37 (emphasis added).

Judge Lamberth also set forth the burden that "parties opposing fee awards" must bear in the future in order to prevail:

> *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market.

App. 37-38 (emphasis in original).

C. *Sexcius*.

Counsel in this first amendment/employment case were two experienced attorneys, Francine K. Weiss and Edith Barnett, who, pursuant to a retainer agreement, were paid $100.00 per hour for their time. Despite that fact, they sought a hourly rate of $260.00 from the District of Columbia. App. 54.

Their fee application was more meager than that in *Covington*. They did not initially disclose their billing rates for fee-paying clients, but simply requested *Laffey*-matrix rates. Eventually they filed declarations stating that they "do not have 'established billing rates'" and that, "because counsel's clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, our rates vary from a pure contingent fee to $187.50 per hour." J.A. (II)71; see also J.A. (II)74.

The Honorable Royce C. Lamberth awarded *Laffey*-matrix rates in a decision that tracks his decision in *Covington*. Among other matters, he rejected the argument that the rate counsel charged in this case should be regarded as the market rate on the grounds that the D.C. Circuit in *SOCM* had ruled that "*[c]ounsels' usual billing rate is . . not directly relevant*" in determining the market rate for an attorney who takes a case on a reduced-fee basis. App. 56 n.4 (emphasis added).

D. *Galloway*.

In this case, challenging the exclusion of a blind attorney from jury service, plaintiff's lead counsel, Vicki G. Golden, sought *Laffey*-matrix rates in a case in which she represented the plaintiff on a contingent-fee basis. She initially did not provide any information about her billing practices although she is a partner in a small District of Columbia firm. Subsequently, in language identical to that of counsel in *Sexcius*, she averred that, "[b]ecause my clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, my rates vary from

[a] pure contingent fee to $200 per hour, and I rely to a great extent on court-awarded fees for my compensation." J.A. (III)50-51.

The Honorable Joyce Hens Green acknowledged that Ms. Golden was seeking fees at an hourly rate she "has never earned . . . in her primarily employment discrimination private practice." App. 77. She ruled, however, that Ms. Golden was entitled to be compensated at "the prevailing market rate." App. 77. She explained:

> Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*. As such, *although in other cases the attorney's 'usual billing rate' may be of great assistance to the determination of the prevailing market rate, that is not the case here.*

App. 78 (emphasis added).

At the same time, however, Judge Green stated that she was "not completely satisfied by the *Laffey* matrix" because, for example, it "does not differentiate between an attorney with twelve years of experience and one with eighteen years." App. 78 & 78 n.1. Nevertheless, she held that the *Laffey* matrix "*provide[s] the most credible evidence available of rates for this market*" and that the District's "*examples of what civil rights attorneys charge . . . is insufficient to undercut . . . the Laffey matrix.*" App. 78 & 79 (emphasis added).

As a result, Judge Green, awarded fees to Ms. Golden at *Laffey*-matrix rates: $250.00 per hour for her work in 1992 and $260.00 per hour for her work in 1993.

IV. The Court of Appeals.

A divided panel of the D.C. Circuit affirmed the decisions of the district courts in all three cases. The decision of the panel majority (Edwards, C.J., & Wald, J,) is principally devoted to an

unusually detailed discussion of the merits of the cases, the hourly-rate evidence, and recitation of the abuse-of-discretion standard. App. 1-21. The panel majority affirmed the decisions setting hourly rates based on the updated *Laffey* matrices even though it too acknowledged that these matrices were flawed:

> Although fee matrices are somewhat crude -- the *Laffey* matrix, for example, lumps attorneys with four to seven years of experience in the same category; attorneys with eleven to nineteen also share the same hourly rate -- *the matrices do provide a useful starting point. To supplement any matrix that has been offered, plaintiffs may also provide* surveys to update the matrix; *affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases*; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.

App. 16 (emphasis added).

Judge Henderson dissented. App. 22-27. In her view, plaintiffs' counsel had been awarded "premium hourly rates" despite the fact that "none of the plaintiffs has demonstrated . . . that the rates awarded prevail for the type of work performed or that the rates their lawyers have historically been able to secure from paying clients are not determinative of 'a reasonable hourly rate.'" App. 22, quoting *Blum v. Stenson*, *supra*, 465 U.S. at 888.

Furthermore, she pointed out that the majority failed to follow Circuit precedent placing the burden of proof on fee applicants. First, although the court previously had ruled that "'[a]n applicant is required to provide *specific evidence* of the prevailing community rate *for the type of work for which he seeks an award*,'" the fee applicants here had "chiefly rel[ied] on adjusted versions of the fee matrix developed more than ten years ago in *Laffey*," which cannot constitute such evidence, "where, as here, the litigation is of a

discrete type that appears to generate its own range of rates." App. 22-23 (internal quotation marks omitted) (emphasis in original).

Second, the district courts had mistakenly placed "the burden of proof on the *District*, not the applicants" and, "[b]ecause *the applicants* have failed to submit evidence that carries their burden . . ., the fee awards here are . . . based on a clear misapplication of legal principles requiring reversal." App. 24-25 (internal quotation marks omitted) (emphasis in original).

Third, at least in *Sexcius* and *Galloway*, "the district court did not give full effect to our precedent requiring it to consider the rates customarily charged by counsel to their paying clients for whom they have *not* reduced their rates in the public interest." App. 25 (emphasis in original). The D.C. Circuit previously had held that "'*the actual rate . . . [an] applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate.*" App. 26 (emphasis supplied by Judge Henderson), quoting *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

In short, Judge Henderson "dispute[d] . . . that a lawyer's billing history can be disregarded in favor of a rate that he has *never* commanded." App. 26 n.7 (emphasis in original). And, she also recognized that, despite the extensive factual discussion in the panel majority's decision, it had endorsed a rule, legislative in nature, for determining hourly rates in federal fee-shifting cases. From now on, attorneys who charge less than the premium rates set forth in the *Laffey* matrix must simply set forth that fact and aver that they charge lower rates because they are public-spirited. They are then entitled to the higher *Laffey*-matrix rates. The *Laffey* matrices are, therefore, not merely the starting point, but the dispositive point.

A divided D.C. Circuit denied rehearing *en banc*. App. 83-84. Judges Henderson and Williams would have granted rehearing.[5]

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[5]Judge Tatel did not participate.

Reasons For Granting The Writ

A divided D.C. Circuit has created a presumption that prevailing counsel in federal fee-shifting litigation should be paid, not at the rates they charge paying clients, nor at the rates that have been shown to attract competent, successful counsel in similar cases. Instead, it has held that these attorneys are entitled to recover fees from defendants at the premium hourly rates charged by the leading members of the bar in particularly complex cases -- *Laffey*-matrix rates. It has done so even though the *Laffey* matrix was designed to reflect only what extraordinarily skilled attorneys could command for complex federal litigation; and even though none of the cases here was particularly complex; the successful attorneys here do not purport to be legal luminaries; and counsel here, as well as comparable counsel in similar cases, do not command *Laffey*-matrix rates in the marketplace. The panel majority's decision, although invoking the language of discretion and purporting to assess a proper lodestar award, in fact creates a rule, legislative in nature, and permits contingency enhancements to be awarded in a new guise. It is not supported by accepted evidentiary principles or by the policies underlying federal fee-shifting statutes.

Review by this Court is necessary for several reasons. First, the decision seriously conflicts with the principles established by this Court for awarding attorney's fees under more than 100 federal fee-shifting statutes. Second, the decision wrongly results in across-the-board awards of premium *Laffey*-matrix rates to counsel who have never been able to charge such rates in the marketplace and requires defendants to pay fees higher than those necessary to attract competent counsel to fee-shifting cases. Thus, it wrongly results in windfalls for attorneys; diverts scarce public resources to attorney subsidies; and skews the market for legal services. Third, the decision is in conflict with the decisions of other Circuits. Other Circuits require fee applicants to bear the burden of proof and to adduce specific evidence of the rates actually charged by the prevailing attorneys in the marketplace and of the rates commanded by comparable counsel in similar cases.

I. THE DECISION OF THE PANEL MAJORITY IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. THIS COURT'S DECISIONS.

In *Blum v. Stenson*, *supra*, this Court set forth two principles that are controlling here. There, this Court explained that, in determining the appropriate hourly rate, or rates, in federal fee-shifting cases:

> . . . courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, *the burden is on the fee applicant to produce satisfactory evidence* -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community *for similar services by lawyers of reasonably comparable skill, experience, and reputation*.

465 U.S. at 896 n.11 (emphasis added). In addition, this Court explained that the term "prevailing market rate" does not refer to a single rate. Instead, it is a term of "convenience" used merely to describe the reasonable hourly rate for a particular attorney's services in a particular case. *Id.* Thus, this Court, reflecting elemental economic theory and experience, recognized that "there is no such thing as a prevailing market rate for the service of lawyers in a particular community." *Id.* at 895 n.11. On the contrary, "[t]he type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively -- even within a law firm," and "[a]ccordingly, the hourly rates of lawyers in private practice also vary widely." *Id.*

Furthermore, this Court in *Dague* rejected contingency enhancements as well as the argument that reasonable attorney's fees may be set on any kind of class-wide basis. It stated that "any approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass, cannot possibly achieve the supposed goal of mirroring market incentives."

112 S. Ct. at 2642. And it recognized the validity of Judge Williams' observation in what became the D.C. Circuit's dispositive contingency-enhancement case, that any such a class-based approach wrongly results in "'the judicial judgment . . . defining the market, not vice versa.'" *Id.*, quoting *King v. Palmer*, 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring).

B. THE PANEL MAJORITY'S DECISION.

The panel majority's decision is in conflict with *Blum* and *Dague*. It adopts a class-based approach for awarding attorney's fees that cannot possibly reflect the market. Under the decision, there are only two requirements for securing fees at the premium levels contained in the *Laffey* matrix. First, an attorney must demonstrate that his rate in a case is a "reduced" rate. This is now easy to do because a reduced rate is any rate lower than the applicable experience rate in the *Laffey* matrix. Second, an attorney must establish that his rate reflects "non-economic" goals. This is also now easy to do because counsel's self-serving representation that public-spiritedness has caused him to charge rates below the premium rates in the *Laffey* matrix will suffice.[6]

In the cases before this Court, plaintiffs' counsel were awarded hourly rates well above those they have ever been able to command in the marketplace. These awards were based almost exclusively on the *Laffey* matrix, as updated by generalized and self-interested attorney affidavits or by the Consumer Price Index, and by district

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[6]The only difficulty the panel majority detected in its approach is to distinguish between attorneys who charge below-market rates because they are public-spirited and "attorneys who charge below-market rates because they cannot command anything more." App. 13. This observation highlights a fundamental flaw in the panel majority's decision -- its failure to understand that the rate an attorney can command in the marketplace *is* his market rate and that rates lower than the premium rates charged by leading members of the bar are also market rates if they are set by market forces irrespective of whether an attorney is public-spirited.

court cases adopting the *Laffey* matrix.[7] These awards were made even though the District provided the only specific information about actual rates charged by comparable counsel in similar cases, which were considerably below those in the *Laffey* matrix. Furthermore, prevailing counsel produced no evidence of any other kind -- *e.g.*, that he or she is regarded as a leading expert in the field -- which would justify paying them more than they ever have been able to charge a client.

The original *Laffey* matrix plainly has little probative force. First, as *Blum* recognizes, in flat contradiction to the market, it differentiates among attorneys only on a class-wide basis of blocks of years of experience. Second, it was constructed based on the hourly rates charged by luminaries of the District of Columbia Bar to assist in establishing hourly rates for other luminaries of the Bar in a complex class action. And when a *Laffey* attorney was not a luminary, the district court there, based on the entire record before it, reduced the matrix rate by *one-third*. In addition, in *Laffey*, the district court based its decision, not on the matrix alone, but on the affidavits from which it was derived, which showed what lawyers with comparable qualifications and expertise actually charged their clients. The *Laffey* matrix, therefore, was not intended to establish, and did not establish, prevailing market rates for all members of the District of Columbia Bar.

The updated *Laffey* matrices are no more probative. First, they are based on the original *Laffey* matrix. Second, the methods used to update it were unscientific. The private bar updates were based on anecdotal information supplied by self-interested attorneys, which

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[7]The panel majority relied on these cases even though the D.C. Circuit previously had ruled, correctly in the District's view, that "fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised." *National Ass'n of Concerned Veterans v. Secretary of Defense*, *supra*, 675 F.2d at 1325 n.7.

is entitled to little, or no, weight.[8] The U.S. Attorney's Office updates, in turn, are based on the Consumer Price Index, which does not purport to be a scientific survey of prices for legal services. Third, the rates set forth in these matrices do not reflect the wide range of rates attorneys actually charge in the market or the rates attorneys actually charge for cases like the cases here.[9]

As a consequence, it is apparent that the decision of the panel majority is based on an erroneous and counter-intuitive theory that the fees necessary to attract competent counsel are higher than the fees that in fact have been sufficient to attract counsel -- including the counsel who have prevailed in the very cases for which fees are sought. The panel majority has ruled that hourly rates, payable by clients, which are acceptable to attorneys in non-fee-shifting litigation or in fee-shifting litigation in which they do not prevail, are not acceptable when defendants are paying the bill. Losing defendants

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[8]*See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 723-25 (1990) ("[t]he impressions" of lawyers contained in affidavits concerning the impact of fee levels on the ability of persons with good claims to secure counsel "are blatantly insufficient to meet [the] . . . burden of proof, even if entirely unrebutted," particularly, where, as there, these affidavits were "small in volume, anecdotal in character, and self-interested in motivation . . .."). The D.C. Circuit sitting *en banc* made a similar point in its dispositive contingency-enhancement case, *King v. Palmer*, *supra*, 950 F.2d at 779 (expressing skepticism about some 70 "obviously self-interested" affidavits submitted in support of a contingency enhancement to lodestar awards and holding that anecdotal evidence from self-interested attorneys cannot be "treated as determinative, or even weighty," in establishing a fee award).

[9]Indeed, plaintiffs' counsel in *Covington* introduced a market rate survey which, even though skewed toward large, commercial firms, underscored that the *Laffey*-matrix rates are premium rates. This survey, from *The National Law Journal*, showed that partner rates in 1990 ranged from $120.00 to $400.00 per hour and that associate rates ranged from $75.00 to $210.00 per hour. J.A. (I)117. The lowest *Laffey*-matrix rates for 1990-91 were $205.00 for partners and $120.00 for associates. J.A. (III)37.

must pay a premium to attorneys who charge rates lower than *Laffey*-matrix rates and who claim to do so for non-economic motivations.

What this means, of course, is that the rates contained in the *Laffey* matrix have become the *floor* for determining "reasonable" hourly rates in fee-shifting cases in the District of Columbia, despite the fact that attorneys are otherwise charging lower, competitive, market-based rates. All plaintiffs' attorneys litigating cases like the ones here, whose rates are below the *Laffey*-matrix rates, will now request and be awarded higher rates based solely on the experience group into which they fall and irrespective of their qualifications and skills (unless, of course, the District, or some other defendant, produces a scientific survey sufficiently persuasive to rebut the non-scientific *Laffey* matrix).

This rule is wrong as a matter of law; defies economic reality; and is not supported by the evidence. First, the rule ignores the broadly divergent marketability and competence of attorneys in the District of Columbia. As *Blum* recognizes, because of market forces -- which take into account factors such as type of services rendered, skill, and reputation -- hourly rates vary widely even for attorneys practicing for *exactly* the same number of years. In addition, it conflicts with *Dague*, which holds that across-the-board enhancements may not be used in setting fees. Fee awards based on the updated *Laffey* matrices, in which courts consider only years of experience and ignore the marketability of individual attorneys, constitute such an enhancement. Indeed, the award of any such "premium rate . . . applicable only when the other side is paying, looks like nothing so much as a disguised multiplier." *Barrow v. Falck*, 977 F.2d 1100, 1105 (7th Cir. 1992) (Easterbrook, J.). *See also Davis v. San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992) (*Dague's* "rejection of contingency as a basis for multiplying a lodestar fee similarly dictates that contingency not be a factor in the setting of billing rates."). Finally, because the original *Laffey* matrix was based largely on rates charged by prominent and highly skilled attorneys in the District of Columbia, its use results in costly and unnecessary attorney windfalls.

In short, as *Blum* correctly acknowledged, reasonable hourly rates for attorneys vary widely. Furthermore, the determination of the "reasonable" or "prevailing market" rate for attorneys like those here -- private, for-profit attorneys -- should begin by reference to their established billing rate. While that rate is not, for that reason alone, the reasonable hourly rate, it should be considered highly relevant proof of *their* prevailing community rate. A court must then examine the hourly rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *Blum v. Stenson*, *supra*, 465 U.S. at 896 n.11, and, in the exercise of its discretion, set a reasonable hourly rate. There is no single rate that can, or should, be applied to attorneys of a given length of experience.

II. The Panel Majority's Decision Is In Conflict With The Decisions Of Other Circuits.

There have long been conflicts and tensions among the Circuits over how to calculate a reasonable hourly rate in accordance with footnote 11 of *Blum*. Indeed, as long ago as 1987, the Third Circuit, in *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1443-48 (3d Cir. 1988) ("*SPRIG*"), identified four distinct interpretations of that footnote in the context of awarding fees, under federal fee-shifting statutes, to attorneys with for-profit practices:

(1) the billing rate rule, mandating the rate an attorney actually charges clients (citing the panel decision in *SOCM*, 826 F.2d 43 (D.C. Cir. 1987); and *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986));

(2) the micro-market rule, emphasizing rates "public interest" lawyers are able to command in the market and permitting a departure from an attorney's own billing rate only when that rate is out of line with rates charged in the micro-market by attorneys of comparable skill and experience (citing *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987); *Mayson v. Pierce*, 806 F.2d 1556

(11th Cir. 1987) (*per curiam*); and *Coulter v. Tennessee*, 805 F.2d 146, 148-50 (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987));

(3) the modified billing rate rule, applying an attorney's customary billing rate, even if it does not appear to reflect the value of the services rendered, and adding to the lodestar a contingency enhancement (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)); and

(4) the community market rate rule, applying the rates charged by counsel of comparable skill, experience, and reputation without regard to an attorney's regular billing rates (citing *White v. Richmond*, 713 F.2d 458 (9th Cir. 1983); and *Hall v. Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987)).[10]

Since *SPRIG*, and despite *Dague's* holding that contingency enhancements may not be awarded, the conflict over the meaning of footnote 11 in *Blum* has continued and intensified. As the following examples demonstrate, the Circuits differ among each other and even internally. Furthermore, although the D.C. Circuit abandoned a strict actual billing rate rule in *SOCM*, the community market rate rule applied in this case is in sharp conflict with the decisions of

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[10]*See also Webb v. Maldonado*, 484 U.S. 990 (1987) (White, J., dissenting from denial of certiorari) (noting square conflict between the Ninth Circuit in that case and the D.C. Circuit in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (1984), *cert. denied*, 472 U.S. 1021 (1985); the tension between the Ninth Circuit's approach and that of the Sixth and Seventh Circuits; and the importance of resolving the issue of how a reasonable hourly rate should be calculated in light of the recurring nature of the issue and the fact that there are more than 100 federal fee-shifting statutes authorizing an award of a reasonable attorney's fee to prevailing parties). Although the D.C. Circuit overruled *Laffey* in its *en banc* decision in *SOCM* insofar as *Laffey* held that for-profit attorneys could never recover more than they charged clients, the conflict and tension among the Circuits have not diminished and the importance to the courts and litigants of a definitive resolution of how a reasonable hourly rate should be calculated in light of *Blum* has increased.

other Circuits and with its own earlier decisions interpreting *Blum* and *SOCM*. None of the other Circuits has adopted a rule that permits prevailing for-profit attorneys to recover hourly rates higher than those they have ever been able to charge based on evidence of what other attorneys in a general experience group may charge.

In *Barrow v. Falck, supra*, for example, the Seventh Circuit appeared to move from a micro-market rule to a billing rate rule. It reversed an hourly rate of $135.00, which the district court had awarded based on "an affidavit from a member of the local bar that . . . the market rate for attorneys possessing the 'experience, qualifications, reputation and ability' of plaintiff's lawyer is $135 per hour in civil rights cases." 977 F.2d at 1104-05. The district court had done so even though plaintiff's lawyer had revealed that his client, a labor union, had paid him between $80.00 and $110.00 for his work in that case and "that this was the rate he regularly charged for his own services, and that he had never in his life received a fee exceeding $120 per hour." *Id.* at 1105. In reversing, Judge Easterbrook, writing for the court, explained:

> Perhaps *other* attorneys . . . have market rates in the range of $135; rates vary with skill and the time a lawyer needs to accomplish a task. But *this* attorney had a market rate of $110 or less. "[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." . . .
>
> At oral argument counsel suggested that the fee he negotiated with the union was too low and that the full agreement called for $80-$110 with certainty plus gravy if he won and could persuade the judge to award more. So stated, the arrangement is a form of contingent fee -- a bonus for winning. . . . [H]owever, the Supreme Court [has] held that risk multipliers are forbidden under . . . fee-shifting statutes . . ..

> . . . Judges must stick to the market rate for the attorneys' time -- that is to say, the opportunity costs of their time, the rate they could receive in other engagements. Unless there is evidence that attorneys receive more per hour, from their own clients, in civil rights litigation than in other kinds of litigation . . . the court must use the hourly rate for the attorney's regular legal services.

977 F.2d at 1105 (emphasis in original).[11]

On remand, the district court again awarded an hourly rate of $135.00, based upon new evidence that counsel previously had been awarded this hourly rate in an action against the same defendant. Once again the Seventh Circuit reversed. *Barrow v. Falck*, 11 F.3d 729 (7th Cir. 1993). In reversing, the court noted, *inter alia*, that "[m]arket prices may go down as well as up; many lawyers have reduced their rates during the recent period of soft demand for legal services" and thus the earlier fee award "could not have resolved" the attorney's "market rate for the indefinite future." *Id.* at 731. The court also noted that the earlier award had been made at the time when "many judges believed it was appropriate to award" an enhancement in cases taken on a contingent-fee basis, a belief rendered erroneous by *Dague*, and the fact that a "judge made the same mistake in an earlier case does not justify repetition." *Id.* at 731 & 732. Finally, the court again turned to the determination of an appropriate hourly rate. It noted that, on remand, plaintiff's counsel had not introduced evidence concerning what portions of his business was at the various rates he charged but "instead offered a flurry of affidavits about what other lawyers charge for their work or hope to receive when courts set the rate." *Id.* at 732. The court was not impressed because this lawyer had his own paying business.

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[11]In *Barrow*, the Seventh Circuit specifically addressed the D.C. Circuit's *en banc* decision in *SOCM*, but, in contrast to the panel majority here, interpreted *SOCM* as "hold[ing] that the market rate of legal time is the opportunity cost of that time, the income foregone by representing this plaintiff." *Id.* at 1105.

It therefore awarded $95.00 per hour, the midpoint between his own stated lowest and highest rates.[12]

By contrast, the Tenth Circuit has adopted the micro-market approach. Thus, in *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994), the court, in an opinion written by the Honorable Milton I. Shadur sitting by designation, awarded fees at a rate *less* than that customarily charged by plaintiff's counsel to his clients because the rate requested exceeded the rate charged by competent counsel doing the same sort of work. *Beard* was a case in which counsel, "with a deservedly high reputation in civil rights litigation," brought his first case under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* *Id.* at 957. The evidence was that plaintiff's counsel regularly charged $200.00 per hour for his services and that he had been awarded this rate by courts in civil rights cases, but that local IDEA specialists charged between $90.00 and $140.00 per hour and that the most frequently charged hourly rate both locally and nationally by IDEA specialists was $125.00. The court approved an hourly rate of $125.00. It explained that "[t]here are of course different markets for different areas of lawyer's work," and that the hourly rates of attorneys specializing in house closings are less than those charged by corporate merger

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[12]*See also Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) (remanding to district court for reconsideration of an hourly rate less than that attorneys commanded in the relevant geographic market which had been set by reference to the rates customarily charged by comparable counsel in the market and noting that "[o]ur recent cases have stressed that the best measure of the cost of an attorney's time is what that attorney could earn from paying clients"); *Casey v. Cabool, Missouri*, 12 F.3d 799, 805 (8th Cir. 1993) ("opportunity cost" is "the starting point for determining a presumptively correct hourly rate"), *cert. denied*, 115 S. Ct. 325 (1994). *Compare Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (ruling that district court should have awarded to out-of-state firm its customary rates even though they were higher than the rates charged by local firms but also ruling that district court did not abuse its discretion in reducing customary rates of local firm based on "his own personal knowledge of the prevailing rates" in the area).

specialists, even though both may be handling real estate acquisitions. *Id.* at 956. Purchasers of a home are, of course, free to hire a merger specialist to handle their house closing, "[b]ut if and when it comes down to fee shifting -- to imposing on the other side an obligation to pay the lawyer's fee . . . -- the higher cost of the merger specialist cannot properly be thrust on someone who did not, after all, make the uneconomic choice of counsel." *Id.*

The Ninth Circuit, in turn, seems to have moved from a community market rate rule to a micro-market rule.[13] *In Davis v. San Francisco, supra*, a complex Title VII class action, the court ruled that the district court had not abused its discretion in awarding rates higher than those charged by plaintiff's counsel based on rates charged by other attorneys engaged in complex Title VII class actions. It also ruled that the city did not overcome this evidence when "*[t]he only evidence it presented concerning billing rates was a survey done of the California legal market as a whole which discussed a wide variety of practice areas.*" 976 F.2d at 1547 (emphasis added).

Still other approaches have been followed by the Second and Fifth Circuits. In *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989), *cert. denied*, 496 U.S. 905 (1990), the district court awarded plaintiff's counsel, a small firm, rates set by reference to its personal knowledge of the rates charged by small and medium firms and rejected plaintiff's argument that he was entitled to fee parity with the large firm that had represented the

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[13]The Third Circuit in *SPRIG* cited the Ninth Circuit's decision in *White v. Richmond, supra*, as adopting the community market rate rule. In *White*, the court rejected the city's complaint that the fee award should be reversed because "prevailing counsel were not required to submit evidence of *their own actual* billing rates." 713 F.2d at 461 (emphasis in original). In rejecting this argument, the court ruled that a trial court may consider evidence of an attorney's customary billing rate but does not abuse its discretion in awarding a higher rate on the grounds that "many civil rights practitioners do not bill their clients at an hourly commercial rate." *Id.*

defendant. The Second Circuit affirmed, ruling that the district court had not abused its discretion in relying on his personal knowledge; that even a legal newspaper article plaintiff had introduced had stated that it was "'trickier'" for small and medium firms to raise rates; and that the rates charged by defense counsel were "'irrelevant.'" *Id.* at 1059.

In *Islamic Center of Mississippi, Inc. v. Starkville, Mississippi*, 876 F.2d 465 (5th Cir. 1989), in turn, the Fifth Circuit remanded a fee award based on hourly rates ($65.00 and $100.00) lower than the rates customarily charged by plaintiff's counsel ($90.00 and $120.00) which were within the "customary range" ($65.00 to $150.00) in the relevant community for "complex civil-rights litigation in federal court . . .." *Id.* at 469, 467. The court did so because the district court gave no reason for its reduction "although the[] rates [requested] concededly fall squarely within the range of prevailing market rates." *Id.* at 469-70.

Even within the D.C. Circuit, there is a conflict over how to determine a reasonable hourly rate. Thus, in *Goos v. National Ass'n of Realtors*, *supra*, the court, adopting an approach similar to that adopted in *Islamic Center*, held that the fact that an attorney's hourly rate is below the *Laffey*-matrix rate is not sufficient, by itself, to prove that it is "below market," and it upheld a fee award based on hourly rates well below those contained in the matrix because those rates were the attorney's customary rates and he had averred that those rates were in line with rates charged by comparable attorneys in comparable cases. 997 F.2d at 1568-69. And, in *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994), the D.C. Circuit, adopting a blended micro-market/community rate approach, upheld an hourly rate of $125.00, the rate charged by experienced lawyers in similar cases, to an attorney who had been charging $150.00 per hour, and stated that "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Id.* at 278, *quoting Blum v. Stenson*, *supra*, 465 U.S. at 895-96 n.11.

In short, the Circuits continue to employ a variety of conflicting approaches to determine the meaning of this Court's prevailing market rate concept in *Blum* and the nature of the proof required of fee applicants to discharge their burden of proof. The panel majority's decision here squarely conflicts with the decisions of the other Circuits on both of these points as well as with previous decisions of the D.C. Circuit.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DARRYL COVINGTON, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1995 Decided June 23, 1995

Nos. 94-7014, 94-7015, 94-7022, and 94-7107

DARRYL COVINGTON; TRACY DEW-BEY; DAVID EDWARDS; LEE ROY FERGUSON; RAYMOND GANT; CHARLES HARRIS; DONALD HUNT; LARRY LEE; LEO WRIGHT; AND CHARLES BARBER,
APPELLEES

v.

DISTRICT OF COLUMBIA; R. BARNES; JAMES BRYANT; P.D. BULLOCK; L.C. CHILDS; D.P. DALTON; H. KING; ROBERT NEWKIRK; M.L. RANDLE; G.M. CUTLER; R. JACKSON; R. NICKENS; F. SCHULER; L.D. JOHNSON; D.E. MARSHALL; L. SESSE-KHALID; RITA GOODALL; OTHER CORRECTIONAL OFFICERS; OTHER UNKNOWN PRESENT OR FORMER DISTRICT OF COLUMBIA LORTON CORRECTIONAL FACILITY OFFICERS,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civ. No. 87cv02658)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Donna M. Murasky, Assistant Corporation Counsel, argued the cause for appellants. With her on the briefs were *Vanessa Ruiz*, Corporation Counsel at the time of filing of appellant's brief, *Charles L. Reischel*, Deputy Corporation Counsel, and *Erias A. Hyman*, Acting Corporation Counsel. *John A. Payton* entered an appearance.

Roger E. Warin argued the cause for appellees. With him on the joint brief were *Mindy A. Kaiden*, *Michael J. Gaffney*, *Daniel M. Schember*, *Vicki Golden*, and *David Cashdan*.

Before: EDWARDS, *Chief Judge*, WALD and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

EDWARDS, *Chief Judge*: This appeal involves consolidated challenges to attorneys' fee awards granted under 42 U.S.C. § 1988 (1988 & Supp. V 1993) in favor of prevailing parties (collectively "plaintiffs") in three civil rights cases against the District of Columbia ("District"). In support of the fee claims, the plaintiffs' attorneys submitted to the District Court declarations describing their billing practices—explaining that when they do bill clients, they charge reduced rates for non-economic, public-spirited reasons—as well as information indicative of their skill, experience, and reputation. They also submitted evidence of the prevailing market rates for complex federal litigation in the District of Columbia. The District opposed plaintiffs' fee applications, claiming that plaintiffs' requested rates were substantially higher than rates charged by similarly experienced attorneys who litigate civil rights and employment discrimination cases in the District of Columbia. In support of its position, the District submitted an affidavit of the Assistant Deputy Corporation Counsel, who recounted rates charged by nine plaintiff attorneys and contended that those rates more accurately reflected prevailing market rates. The District Court disagreed.

The District Court found that plaintiffs' attorneys intentionally charged their poorer clients reduced rates for non-economic, public-spirited reasons. The record indicates plain-

tiff counsels' years of legal experience as well as their ability to handle complicated federal cases. The court found that the relevant market was complex federal litigation and that plaintiffs' requested rates were in line with those prevailing in the District of Columbia for similar services by lawyers of reasonably comparable skill, experience, and reputation. Thus, relying on established law, the District Court granted plaintiffs' motion for reasonable attorneys' fees. Finding no abuse of discretion, we affirm the judgments of the District Court.

In section 1988 attorneys' fee cases, attorneys who customarily charge reduced fees reflecting non-economic, public-spirited goals may seek fees based on the prevailing market rates if the prevailing party demonstrates the reasonableness of the requested hourly rates. That burden entails the following: first, if the attorney customarily charges clients lower rates than plaintiff has requested under section 1988, the attorney must demonstrate that the customarily reduced rates are charged for non-economic reasons; second, the attorney must offer information documenting his or her skill, experience, and reputation; and third, the attorney must produce evidence of the prevailing market rates in the relevant community for attorneys of comparable skill, experience, and reputation. In the instant cases, plaintiffs met this burden, and the District offered little by way of rebuttal. Accordingly, the District Court did not err in finding plaintiffs' requested rates reasonable and granting the motions for attorneys' fee awards. Nor did the District Court err in determining that *complex federal litigation* was the relevant market for purposes of establishing the prevailing market rates in the District of Columbia. Accordingly, we affirm the District Court's attorneys' fee awards in all three cases.

I. Background

In these consolidated cases, plaintiffs supported their motions for attorneys' fees by submitting evidence of their attorneys' billing practices, their attorneys' legal experience, skill, and reputation, and the prevailing market rates for

complex federal litigation in the District of Columbia. Plaintiffs' motions were granted in all three cases. Although each case involved a different claim—*Covington v. District of Columbia*, 839 F. Supp. 894 (D.D.C. 1993), was a prisoners' rights case; *Sexcius v. District of Columbia*, 839 F. Supp. 919 (D.D.C. 1993), was a First Amendment case; and *Galloway v. Superior Court*, Civ. Action No. 91–0644 (D.D.C. Apr. 21, 1994), was a handicap discrimination case—and each was brought by different attorneys, the plaintiffs in each case submitted substantially similar evidence. A detailed review of the evidence presented in *Covington* will suffice to provide the necessary foundation for our analysis.[1]

Attorneys for the plaintiffs in *Covington* brought a section 1983 action on behalf of ten prison inmates who were beaten while shackled and handcuffed and nine inmates who were sent to a maximum security facility without proper hearings. *Covington*, 839 F. Supp. at 895. The jury found for the plaintiffs, the District appealed, and then the parties settled while the appeal was pending. *Id.* The settlement provided that plaintiffs were entitled to an attorneys' fee award; but when the parties could not agree on the appropriate hourly rate, the plaintiffs filed a motion for attorneys' fees.

Plaintiffs' fee application included information pertaining to counsels' billing practices; their experience, skill, and reputation; and the prevailing market rates for complex federal litigation in the District of Columbia. Specifically, the lead attorneys in the case, Michael Gaffney and Daniel Schember, submitted declarations, explaining that they compose a two-attorney firm which handles federal court litigation concerning civil rights and civil liberties, military and veterans law, employment and labor law, and administrative proceedings. According to their declarations, Gaffney and Schember

[1] For the sake of simplicity, our references to the parties and to the District Court will focus on the *Covington* litigation. We emphasize, however, that there are no material differences in the three cases on the principal points here in issue, and neither side suggests otherwise.

choose clients and cases based on "commitments to the clients and to the constitutional and statutory rights at issue," Declaration of Michael J. Gaffney at 5, Joint Appendix (J.A.) at I–163, and they offer needy clients reduced or below-market rates for these non-economic reasons.[2] The ten inmate plaintiffs in *Covington* were indigent. As Schember's declaration explains, the lead attorneys took the case "to seek to enforce the constitutional prohibition against punitive beating of prisoners." Declaration of Daniel M. Schember at 6, J.A. at I–155. Gaffney's and Schember's declarations each recount their significant experience since 1975, at the Lawyers Committee for Civil Rights Under Law, and since 1977, at their own firm, practicing federal court litigation on a variety of issues.[3] Their declarations also provide indications of their reputations, listing teaching positions[4] and fellowships,[5] awards received,[6] participation in congressionally mandated

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[2] From 1986 to 1990, Gaffney's and Schember's highest hourly rate was $125, and from 1990 to the present, their highest hourly rate was $150. They also accept clients on an attorneys' fee award or contingency fee basis. Declaration of Gaffney at 2, 12–13, J.A. at I–160, I–170–71.

[3] Schember and Gaffney were lead or sole counsel in several cases brought in federal district court, federal court of appeals, and the Supreme Court. Declaration of Schember at 2–5, J.A. at I–151–54; Declaration of Gaffney at 2–4, J.A. at I–160–62.

[4] Schember taught administrative law, constitutional law, and advanced legal research and writing at Antioch School of Law as an adjunct professor during the 1980s. Declaration of Schember at 5, J.A. at I–154.

[5] Gaffney received an education law fellowship from the Legal Services Corporation's Research Institute for Legal Assistance to co-author a paper on organizing the private bar to address the problems of urban education. Declaration of Gaffney at 8, J.A. at I–166.

[6] In 1982, the ACLU Fund of the National Capital Area awarded their firm the Alan Barth Service Award for their effort in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Declaration of Gaffney at 7, J.A. at I–165.

studies,[7] and chairing the D.C. Bar's Committee on Military and Veterans Rights.[8]

Two other attorneys in the *Covington* case, Linda Delaney and Mark Hager, also submitted declarations regarding their billing practices and experience. Delaney's declaration revealed that when she bills clients, she charges below-market prices for non-economic reasons.[9] Declaration of Linda A. Delaney at 5–6, J.A. at I–189–90. Delaney, who has practiced law since 1984, submitted descriptions of eight federal civil rights or employment cases in which she was involved as well as actions brought in District of Columbia courts. Declaration of Delaney at 2–3, J.A. at I–186–87. Hager, who holds a J.D. and a Ph.D. from Harvard and currently teaches law at American University, stated that he does not have a standard hourly rate for litigation. Declaration of Mark M. Hager at 1, 3, J.A. at I–191, I–193. He practiced law full time for one year at a Boston law firm, doing commercial and criminal defense litigation, and since 1987, when he began teaching full time, he has represented clients in political asylum cases, employment cases, prisoners' rights cases, and has acted as a commercial arbitrator. Declaration of Hager at 1–3, J.A. at I–191–93. In addition, plaintiffs used the services of two law

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[7] Schember and Gaffney have participated in several federally funded inter-disciplinary policy research studies concerning implementation of federal education programs. Declaration of Gaffney at 8, J.A. at I–166.

[8] Gaffney also served on the board of directors of the National Veterans Legal Services Project, a non-profit organization funded by the Legal Services Corporation, Vietnam Veterans of America, and the Agent Orange Class Assistance Program. Declaration of Gaffney at 9, J.A. at I–167.

[9] In 1988, Delaney set her hourly rate at $125 and has not changed it. She asserted that she "essentially permit[s][her] clients to pay what they could afford when they could afford it." Declaration of Delaney at 5, J.A. at I–189.

graduates and two law students. *Covington*, 839 F. Supp. at 900–01.

The *Covington* plaintiffs submitted a good deal of evidence establishing the prevailing market rates for comparably experienced attorneys handling complex federal litigation. They submitted the original *Laffey* matrix, a schedule of charges based on years of experience developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).[10] Plaintiffs also submitted affidavits attesting to increases in the market rates since the original *Laffey* matrix was established; the U.S. Attorney's Office version of the updated *Laffey* matrix; the memorandum opinions in *Robles v. United States*, Civ. Action No. 84–3635, (D.D.C. Jan. 10, 1992), J.A. at I–119, and *Fischbach v. District of Columbia*, Civ. Action No. 87–0646 (D.D.C. Jan. 3, 1993), J.A. at I–254, in which district courts awarded fees based, in part, on the *Laffey* matrix; and an EEOC decision, *Hatfield v. Garrett*, Appeal No. 01892909 (E.E.O.C. Sept. 26, 1990), J.A. at I–90, in which the EEOC awarded attorneys' fees using the updated *Laffey* matrix.[11]

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[10] The original *Laffey* matrix rates for 1983 were as follows:

$175 an hour for very experienced federal court litigators, *i.e.*, lawyers in their 20th year or more after graduation from law school;

$150 an hour for experienced federal court litigators in their 11th through 19th years after law school graduation;

$125 an hour for experienced federal court litigators in their 8th through 10th years after graduation from law school;

$100 an hour for senior associates, *i.e.*, 4 to 7 years after graduation from law school; and

$75 an hour for junior associates, *i.e.*, 1 to 3 years after law school graduation.

Laffey, 572 F. Supp. at 371. The *Laffey* court noted that plaintiffs' fee matrix was supported "with a barrage of data." *Id.*

[11] *Covington* attorneys also submitted 1988, 1989, and 1990 hourly rate information for lawyers in more than a dozen local law firms used by plaintiffs in *Lewis v. Brady*, Civ. Action No. 82–0918 (D.D.C. Feb. 7, 1991), J.A. at I–113–17, as well as affidavits from

Based on this evidence, plaintiffs requested fees for Schember and Gaffney at a rate of $260 per hour, which represented the 1993 prevailing market rate [12] for experienced federal court litigators with eleven to nineteen years of experience in an updated version of the *Laffey* matrix [13] and the U.S. Attorney's Office matrix.[14] Plaintiffs requested attorneys' fee awards at an hourly rate of $160 for Delaney and Hager, which represents a rate just under that suggested by the U.S. Attorney's Office matrix for attorneys with four to seven years experience. Finally, plaintiffs requested that the two law graduates be awarded $85 per hour (less than the prevailing market rate of $125 under the U.S. Attorney's Office matrix), and that the two law students be awarded $70 per hour (the prevailing market rate for paralegals and law clerks under the U.S. Attorney's Office matrix). *See Covington*, 839 F. Supp. at 900–03.

The District opposed plaintiffs' request for attorneys' fees, arguing that a submarket of plaintiff attorneys who handle civil rights and employment discrimination cases existed, and that the prevailing market rate for this submarket of attor-

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four attorneys in *Robles* attesting to the reasonableness of annual increases of $10 per hour for the updated *Laffey* matrix. *See* J.A. at I–141–49.

[12] Plaintiffs requested current market rates rather than the rates that prevailed in the market when counsel actually worked on *Covington* to compensate for the delay in payment of their attorneys' fees. *See Covington*, 839 F. Supp. at 902.

[13] Although the *Laffey* matrix charts fees only up to 1988–89, the *Robles* district court updated the *Laffey* matrix by adding $10 per hour to the 1988–89 hourly rate of $220 and to the hourly rates of each succeeding year. *See Covington*, 839 F. Supp. at 900 (citing *Robles*, Civ. Action No. 84–3635, slip op. at 16 & n.7).

[14] The U.S. Attorney's Office developed its fee matrix by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate and rounding upwards if the sum is within $3 of the next $5 multiple. *See Covington*, 839 F. Supp. at 900.

neys with between ten and twenty years of experience was well below that requested by plaintiffs in this case. In support, the District submitted the declaration of Michael Zielinski, Assistant Deputy Corporation Counsel in the Civil Division of the Office of Corporation Counsel, who recounted plaintiffs' requests for attorneys' fees in nine cases brought by solo practitioners or small firms against the District of Columbia. Zielinski Declaration at 2–7, J.A. at I–218–23. Zielinski suggested that there were "a large number of attorneys in the District's legal marketplace who . . . litigate complex cases like employment discrimination and civil rights actions and who have established hourly billing rates at or near $150." Zielinski Declaration at 8, J.A. at I–224. A majority of the nine plaintiff attorneys identified by Zielinski had requested attorneys' fees at their usual billing rates; and two of the attorneys had sought market rates akin to those in the *Laffey* matrix.

The District Court found for plaintiffs and awarded them the requested attorneys' fees. The trial judge noted that, because the *Covington* "plaintiffs' assertions that their counsel have taken public interest cases for below-market rates are reasonably well-documented" and that these assertions were "virtually unchallenged," the court would "take plaintiffs at their word." *Covington*, 839 F. Supp. at 897. The District Court Judge also noted that "[p]laintiffs' counsel handled very well this complicated federal case, which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial." *Id.* at 895. The District Court found that plaintiffs presented "sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters." *Id.* at 898. In reviewing the evidence plaintiffs submitted on the prevailing market rates, the District Court noted that the *Laffey* matrix had been "relied upon, at least in part, by six District of Columbia district judges and that [it had] received a degree of approval" from this court in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (*en banc*). *Id.* (citations omitted). The court also reviewed the fee matrix

"developed by the U.S. Attorney's Office for the District of Columbia that the U.S. Attorney relies upon in settlements." *Id.* In short, the trial court found that plaintiffs met their evidentiary burden, and that defendants' factual rebuttal of plaintiffs' evidence was ineffectual. *Id.* at 899–900.

The District Court found the District's evidence unpersuasive: "Defendants' sole affidavit . . . cites only seven instances in which lawyers with 10–20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $150 per hour is the prevailing rate across the District of Columbia in this sub-market." *Id.* at 898. Finally, the District Court rejected the District's submarket theory, noting that the District had failed to convince the court "that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own," and that "the prevailing rate in the sub-market . . . is—as defendants claim—lower than the rate prevailing in the broader legal market" of complex federal litigation. *Id.* at 898 & n.8.

The District Court awarded plaintiffs attorneys' fees for Gaffney and Schember at an hourly rate of $260; for Delaney and Hager at an hourly rate of $160; for the law graduates at an hourly rate of $85; and for the law students at an hourly rate of $70. *Id.* at 900–02. Defendants conceded to the reasonableness of the hours claimed in plaintiffs' original motion. *Id.* at 903.

II. Analysis

The fee shifting provision embraced by 42 U.S.C. § 1988(b), covering federal civil rights actions, provides that

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Blum v. Stenson*, 465 U.S. 886, 895 (1984), the Supreme Court determined that Congress intended

> "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.

Four years later, this court, sitting *en banc*, held that

> the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals.

Save Our Cumberland Mountains, 857 F.2d at 1524 ("*SOCM*").

This case involves a relatively straightforward application of these principles. The attorneys in the instant cases, who either practice privately and for-profit but at reduced rates reflecting non-economic goals or who have no established billing practice, request the prevailing market rates.[15] Under the Supreme Court's decision in *Blum* and this court's decision in *SOCM*, we think it is quite clear that plaintiffs' attorneys are entitled to an award based on the prevailing market rates, and we can find nothing in the records of these cases to indicate that the trial judges abused their discretion under the statute in awarding fees.

A. The Attorneys' Fee Case

As the Supreme Court has stated, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences." *Blum*, 465 U.S. at 902 n.19. Where settlement is not possible, case law establishes a clear structure for the determination of reasonable fees.

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[15] Plaintiffs do not request any enhancements above the "lodestar" to compensate their attorneys for the risk of accepting contingency fee arrangements.

Under the statute, the district court is expressly empowered to exercise its discretion in determining the amount of a fee award, *see* 42 U.S.C. § 1988(b); however, a fee applicant bears the burden of establishing entitlement to an award, documenting the appropriate hours, and justifying the reasonableness of the rates, *see Blum*, 465 U.S. at 896 n.11 ("[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates."); *Hensley*, 461 U.S. at 437 ("[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.").

As a general matter, this court has characterized the *Blum* formulation as constituting a three-part analysis: "(1) determination of the number of hours reasonably expended in litigation; (2) determination of a reasonable hourly rate or 'lodestar'; and (3) the use of multipliers as merited." *SOCM*, 857 F.2d at 1517; *see also In re Donovan*, 877 F.2d 982, 992 (D.C. Cir. 1989); *In re Olson*, 884 F.2d 1415, 1423 (D.C. Cir. 1989). In this case, however, only the second prong—the determination of a reasonable hourly rate—is at issue. As noted above, a fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community. *See Blum*, 465 U.S. at 896 n.11; *SOCM*, 857 F.2d at 1524.

First, in cases in which prevailing attorneys request rates which are greater than those they normally charge, the attorneys must offer some evidence that they charge reduced rates for public-spirited or non-economic reasons. In *SOCM*, the court addressed the claims of attorneys engaged in private, for-profit practice, who "adjusted fee schedules downward from pro bono or quasi public interest motives to reflect the reduced ability of the client to pay or what the attorney saw as the importance and justice of the client's cause." 857 F.2d at 1519. Building on the Supreme Court's decision in *Blum*—which allowed market-rate fees for attorneys in non-profit legal services organizations—the *SOCM* court concluded:

> Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic.

857 F.2d at 1524.

As was true in *SOCM*, the burden is on the fee applicant to show that the attorney's billing practices are of the sort covered by the *SOCM* test. That is, the attorney must show that his or her custom of charging reduced rates is in fact attributable to "public spiritedness." Implicit in this line of inquiry is the assumption that the law was not written to subsidize attorneys who charge below-market rates because they cannot command anything more. And a defendant is free to rebut a fee claim on these terms in cases in which the issue is posed. We recognize that, in some cases, this may be a difficult line of inquiry, for an attorney who cannot command market rates invariably will have a "custom" of charging rates below the market. This problem is diminished with respect to attorneys who charge variable rates (both at and below the market, with the latter attributable to public-spirited goals). In any event, it is within the sound discretion of the district court to weigh the evidence to determine whether an attorney customarily charges reduced rates for non-economic reasons.

Second, prevailing parties must offer evidence to demonstrate their attorneys' experience, skill, reputation, and the complexity of the case they handled. In articulating the plaintiffs' burden in these cases, the Supreme Court required that fee applicants "produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11.[16] To

[16] The Supreme Court noted that the Senate Report accompanying the Civil Rights Attorneys' Fee Award Act of 1976 explicitly approved of the "appropriate standards" for awarding attorneys' fees set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d

some extent, this second element of the reasonable-rate analysis informs the first element of the inquiry, for as the *SOCM* court noted: "We do not propose . . . that all attorneys be remunerated at the same rate, regardless of their competence, experience, and marketability. We only aim to provide that their experience, competence, and marketability will be reflected in the rate at which they are in fact remunerated." [17] 857 F.2d at 1521 n.4.

Third, plaintiffs must produce data concerning the prevailing market rates in the relevant community for attorneys of reasonably comparable skill, experience, and reputation. This is undoubtedly a difficult assessment, and the Supreme Court has so acknowledged:

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

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714 (5th Cir. 1974). *See Blum*, 465 U.S. at 893 (quoting S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)). One of the several factors the court used to determine reasonable attorneys' fees in *Johnson* was the "experience, reputation, and ability of the attorneys." 488 F.2d at 718. And in *Blum*, the Supreme Court appeared to focus primarily on this factor. *See* 465 U.S. at 890 n.4 (noting years in which attorneys graduated from law school, years and general type of legal experience, and whether attorneys served as judicial law clerks); *id.* at 895 n.11 (noting lawyers' experience, skill, and reputation varies extensively).

[17] In *SOCM*, the court approved of the district court's use of the *Laffey* matrix, a schedule of hourly rates based largely on years of experience. *See SOCM*, 857 F.2d at 1525. Attorneys would have to state their federal court experience in order to get *Laffey* rates.

Blum, 465 U.S. at 895 n.11. However, as this court stated in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982), "[t]he complexity of the market for legal services does not ... reduce the importance of fixing the prevailing hourly rate in each particular case with a fair degree of accuracy."

The Supreme Court's decision in *Blum* establishes the framework for analysis:

> To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 896 n.11. The Court also noted that "rates charged in private representations may afford relevant comparisons." *Id.; see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) ("A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market ... and one that grants the successful civil rights plaintiff a 'fully compensatory fee,' ... comparable to what 'is traditional with attorneys compensated by a fee-paying client.' ") (citations omitted).

In order to demonstrate this third element, plaintiffs may point to such evidence as an updated version of the *Laffey* matrix or the U.S. Attorney's Office matrix, or their own survey of prevailing market rates in the community. In *SOCM*, we approved of the district court's reliance, at least in part, on the schedule of prevailing rates compiled in *Laffey*. Although the *SOCM* court remanded the case to the district court for the limited purpose of making new findings as to reasonable hourly rates at the time the services were performed, it stated:

> We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court

> in *Laffey*. Indeed, we commend its use for the year to which it applies. Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years.

SOCM, 857 F.2d at 1525. Although fee matrices are somewhat crude—the *Laffey* matrix, for example, lumps attorneys with four to seven years of experience in the same category; attorneys with eleven to nineteen also share the same hourly rate [18]—the matrices do provide a useful starting point. To supplement any matrix that has been offered, plaintiffs may also provide surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.

"When . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Blum*, 465 U.S. at 897. At this point, the defendant may challenge the plaintiffs' application for attorneys' fees, but the Government's burden in rebuttal is not without demands:

> Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. Although there may be occasions in which the applicant's showing is so weak that the Government may without more simply challenge the rate as unsubstantiated, in the normal case the Government

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[18] In fact, the District Court in *Galloway v. Superior Court* noted its dissatisfaction with the *Laffey* matrix in this regard: "The Court accepts as credible evidence the Matrix, but nonetheless would hope that a more complete breakdown and study of rates could be compiled for future use in attorneys' fee awards." Civ. Action No. 91–0644, slip op. at 4 n.1.

> must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate.

Concerned Veterans, 675 F.2d at 1326.

Defendants may challenge any part of the prevailing parties' case for attorneys' fees. For example, defendants may challenge the plaintiff attorneys' claims that they charge reduced rates for non-economic reasons, and this might include a claim that under no circumstances would that particular plaintiff's attorney ever command the rates he or she requests. Defendants also may challenge the plaintiff attorneys' claims as to their competence, experience, reputation, or performance in the instant case. Finally, defendants may challenge plaintiff attorneys' market data, in an effort to show that the submitted market rates are inaccurate.

B. The Claims in this Case

Our review function in this case is limited, for district courts act with a real measure of discretion in granting a fee award under section 1988. *See Blum*, 465 U.S. at 902 n.19 ("A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness."); *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) ("A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence."); *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*) ("It is common learning that an attorney's fee award by the District Court will be upset on appeal only if it represents an abuse of discretion."). This limited standard of review is "appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

In this case, plaintiffs clearly met their burden and their requested rates were properly accorded a presumption of reasonableness. Plaintiffs submitted their counsels' declarations attesting that they charged below-market rates for non-

economic, public-spirited reasons.[19] Plaintiffs submitted data demonstrating their attorneys' experience in the legal profession and in litigating complex federal court cases, as well as information probative of their attorneys' skill and reputation. Finally, plaintiffs submitted a great deal of evidence regarding prevailing market rates for complex federal litigation. This included the *Laffey* matrix, the U.S. Attorney's Office matrix, affidavits attesting to increases in the market rates since the original *Laffey* matrix, and memorandum opinions in district court cases which relied on these matrices.

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[19] The dissenting opinion appears to challenge the District Court's findings that counsel in *Sexcius* and *Galloway* reduced their rates for non-economic reasons. However, the record clearly supports the District Court on this point.

Counsel in *Galloway* submitted an affidavit explaining that "[b]ecause my clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, my rates vary from pure contingent fee to $200 per hour, and I rely to a great extent on court-awarded fees for my compensation." Second Affidavit of Vicki G. Golden, J.A. at III–50–51. The District Court determined that "[b]ecause this case involves both attorneys who practice privately and for profit but who give reduced rates to many clients, and attorneys who practice in public interest legal services organizations, *SOCM* is particularly relevant." *Galloway*, slip op. at 3, J.A. at III–14. The District Court found that "[plaintiffs' counsel] is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*." *Id.* Counsel in *Sexcius* submitted an affidavit with similar explanations, stating that their "clients are unable to pay the rates prevailing in the community for complex federal litigation," and that they "charged plaintiffs a low hourly rate because their case was important and as teachers they could not afford the prevailing market rates." Declaration of Francine K. Weiss, J.A. at II–71. The District Court in *Sexcius* found that "[b]ecause plaintiffs' counsel charged plaintiffs this low $100 rate out of public interest motives, plaintiffs are entitled to collect the prevailing market rate, not merely the rate they actually charged plaintiffs." *Sexcius*, 839 F. Supp. at 921. This court does not disturb the factual findings of the district court when they are supported by the record.

The District, on the other hand, submitted little in rebuttal. First, the District attempted to challenge plaintiffs' requested hourly rates by suggesting that these rates were higher than the established billing rates of attorneys who litigate complex federal cases. In support, the District submitted a single declaration from an Assistant Deputy in its office recounting cases which, for the most part, were inapposite to the case at bar: attorneys in a majority of those cases never requested fees at prevailing market rates; nor did they suggest that they charged below-market rates for non-economic reasons; rather they simply sought the rates at which they typically billed clients. *See* Zielinski Declaration at 3–8, J.A. at I–219–24. One of the attorneys mentioned in Zielinski's declaration requested and received prevailing market rates in line with the *Laffey* matrix. *See id.* at 8, J.A. at I–224; *Fischbach v. District of Columbia*, Civ. Action No. 87–0646 (D.D.C. Jan 3, 1993), J.A. at I–254. Simply put, although the District does not bear the ultimate burden in this case, its evidence did not come close to rebutting the presumption of reasonableness plaintiffs established. The District Court therefore correctly "rel[ied] solely upon plaintiffs' unrebutted evidence." *Covington*, 839 F. Supp. at 900.

Second, the District attempted to argue that plaintiffs are only entitled to the rates they regularly charge, *i.e.*, that these rates are in fact the prevailing market rates. This argument was considered and rejected by this court in *SOCM*, and, therefore, merits little attention here. As the *SOCM* court stated, "[t]he result sought by plaintiffs, that is a fee award based on prevailing market rates rather than the actual rates of [plaintiffs' attorneys], is not only not inconsistent with the express intent of Congress, but rather accomplishes Congress' express goals."[20] 857 F.2d at 1521. Thus, the *en banc* court concluded: "Henceforth, the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflect-

[20] In reviewing a case approved of in the Senate Report that accompanied the Civil Rights Attorneys Fee Award Act, the *SOCM*

ing non-economic goals." *Id.* at 1524. The District Court properly dismissed the District's argument that plaintiffs are only entitled to an award based on the fees their attorneys routinely charge clients.

Finally, the District argues that the court should define the relevant market, for purposes of determining the prevailing market rates, narrowly, as including only plaintiff attorneys in civil rights, employment, or discrimination actions. *Covington*, 893 F. Supp. at 897. The District Court rejected this narrow definition, noting that the District failed to show that a civil rights and employment discrimination market actually exists independent of attorneys who handle other types of complex federal litigation. *Id.* at 898 n.8. And even assuming, *arguendo*, the existence of such a submarket, the trial court found no evidence that submarket rates are lower than the prevailing rates in the broader legal market. *Id.* at 898. The District only weakly challenges this determination on appeal,[21] so we are hard-pressed to find even a compelling argument to address.

The Senate Report accompanying the enactment of section 1988 suggests that Congress envisioned rates to be set according to standards in other types of complex federal litigation: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights may be nonpecuniary in nature." *Blum*, 465 U.S. at 893 (quoting

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court noted that "Congress did not intend to use historical billing rates as a cap on fee awards." *SOCM*, 857 F.2d at 1523 (quotations omitted).

[21] The District mentions in its brief that the market consists of those attorneys who litigate "employment discrimination and civil rights actions in the District of Columbia." Brief for the District of Columbia at 43. However, the point was not pressed in its briefs; nor did counsel attempt to argue the point when asked at oral argument about whether the District challenged the scope of the relevant market. In fact, counsel for the District suggested that this court need not reach that issue.

S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)).[22] The point is that "Congress after all did not simply express its intent that the fees would attract counsel, but rather that they would be 'adequate to attract *competent* counsel.'" *SOCM*, 857 F.2d at 1521 (quoting S. REP. No. 1011 at 6).

In short, we can find no basis to overturn the District Court's determination that the relevant market is that of complex federal litigation.

III. CONCLUSION

For the foregoing reasons, we hold that the District Court did not abuse its discretion in awarding plaintiffs reasonable attorneys' fees in these consolidated cases.

So ordered.

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[22] Indeed, as noted by the Third Circuit, it makes little sense to narrow the market in the fashion suggested by the District in this case:

> Courts that try to establish public interest market rates by looking to the going rate for public interest work . . . do not examine an independently operating market governed by supply and demand, but rather recast fee awards made by previous courts into "market" rates. Courts adopting this micro-market approach, therefore, engage in a tautological, self-referential enterprise.

Student Pub. Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436, 1446 (3d Cir. 1988).

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

The Supreme Court has made clear that federal fee shifting statutes "were not designed as a form of economic relief to improve the financial lot of lawyers." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). The majority nonetheless affirms fee awards totalling nearly $664,000 in public funds calculated on the basis of premium hourly rates. I respectfully dissent because none of the plaintiffs has demonstrated as required by our previous opinions that the rates awarded prevail for the type of work performed or that the rates their lawyers have historically been able to secure from paying clients are not determinative of a "reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984).

The majority recognizes that a fee applicant bears the burden of justifying the reasonableness of his requested hourly rate by showing "at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community." Maj. Op. at 12. In my view, however, it does not follow our precedent prescribing the evidence necessary to meet that burden with respect to at least two of the elements.[1] First, "[a]n applicant is required to provide *specific evidence* of the prevailing community rate *for the type of*

[1] I assume *arguendo* that the applicants meet the skill and experience requirements. I part from the majority insofar as it, unlike the district court, relies on special interest recognition within the applicants' limited area of practice to evaluate their experience. Maj. Op. at 5–6 & nn.4–8. I would suggest that broader assessment such as that reflected in law directory listings like, for example, the Martindale–Hubbell Law Directory provides more probative "pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate." *National Ass'n of Concerned Veterans v. Secretary of Defense* (*NACV*), 675 F.2d 1319, 1326 (D.C. Cir. 1982). The Martindale–Hubbell ratings are derived from confidential surveys of members of the bar and, significantly, the judiciary and "take[ ] into consideration experience, nature of practice and qualifications relevant to the profession." 4 Martindale–Hubbell Law Directory XI (1994).

work for which he seeks an award." *National Ass'n of Concerned Veterans v. Secretary of Defense* (*NACV*), 675 F.2d 1319, 1325 (D.C. Cir. 1982) (emphasis added); *see also Blum*, 465 U.S. at 896 n.11; *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (*en banc*) ("The reasonable hourly rate is that prevailing in the community for similar work."). The applicants have not met this burden because they rest their applications entirely on evidence of rates in the broad market of "complex federal litigation" that provides no basis for the district court [2] to determine the rate prevailing for the *specific* type of work performed by them.

The applicants chiefly rely on adjusted versions of the fee matrix developed more than ten years ago in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984); *cert. denied*, 472 U.S. 1021 (1985). We have not considered whether the broad *Laffey* matrix constitutes "specific evidence" of rates charged for "similar" [3] work performed irrespective of the nature of the litigation. In my view the *Laffey* matrix cannot do so where, as here, the litigation is of a discrete type that appears to generate its own range of rates. For example, as demonstrated by the evidence submitted by the District of Columbia (District), "the hourly rates ... in the *Laffey* matrix are substantially higher than the hourly rates charged by similarly experienced attorneys who litigate employment discrimination, civil rights and other types of damages actions in the courts of the District of Columbia." Joint Appendix (JA) I-218.[4]

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[2] Unless otherwise specified, the term "district court" refers to both district judges who decided the three fee awards consolidated on appeal.

[3] *NACV*, 675 F.2d at 1324.

[4] The data submitted with the District's affidavit indicate that the *Laffey* rates significantly overstate the non-reduced market rates charged to fee-paying clients for employment discrimination and other civil rights cases in the District of Columbia, sometimes by more than $100 an hour. *See, e.g.*, JA I-220-21, 243-44 (hourly rate of $150 compared to *Laffey* rates of $250 and $260); JA I-221-22,

In my view, the district court in *Covington* correctly outlined the *type* of specific evidence required to fulfill the burden prescribed by *NACV*:

> A *statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)

Covington v. District of Columbia, 839 F. Supp. 894, 899 (D.D.C. 1993) (emphasis in original).

Where the district court committed error, however, was in placing the burden of proof on *the District*, not the appli-

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247–48 (hourly rate of $150 compared to *Laffey* rates of $290 and $300). If the $150 figure accurately estimates the prevailing community rate for this litigation specialty, the bulk of the awards here is based on hourly rates overstated by more than $100 per hour. The difference amounts to more than $109,000 in additional fees for Schember and Gaffney, *see Covington v. District of Columbia*, 839 F. Supp. 894, 903 (D.D.C. 1993) (996 hours at $260 per hour) and more than $100,000 in additional fees for Weiss and Barnett, *see Sexcius v. District of Columbia*, 839 F. Supp. 919, 929 (D.D.C. 1993) (912 hours at $260 per hour).

cants.[5] Because *the applicants* have failed to submit evidence that carries their burden under *NACV*, the fee awards are in my view based on a "clear misapplication of legal principles" requiring reversal. *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994). Although the majority affirms the district court's reasoning that the applicants are nonetheless entitled to the matrix-based rates they claim simply because "[t]he District . . . submitted little in rebuttal," Maj. Op. at 19,[6] the sufficiency of the District's rebuttal is relevant only if the applicants first meet *their* burden.

Second, in *Sexcius* and *Galloway*, the district court did not give full effect to our precedent requiring it to consider the rates customarily charged by counsel to their paying clients for whom they have *not* reduced their rates in the public interest. The court in *NACV* explained

> counsel for applicants may be required to submit specific evidence of his or her actual billing practice during the

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[5] Nothing in *Save Our Cumberland Mountains, Inc. v. Hodel* (*SOCM*), 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*), altered either the burden of proof imposed by the court's earlier opinions or who bears it. Indeed, the court expressly noted that "[h]enceforth, the prevailing market rate method *heretofore used in awarding fees* to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *Id.* at 1524 (emphasis added). Although the court "commend[ed]" the use of the *Laffey* matrix in that case without evaluating it in any detail, *id.* at 1525, it bears note that *SOCM* involved a fee award under the Surface Mining Control and Reclamation Act. *Id.* at 1517. Fee awards under that statute are undoubtedly so few in number, at least compared with the type of litigation involved here, that use of the broad *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate.

[6] *See Covington*, 839 F. Supp. at 897; *Sexcius v. District of Columbia*, 839 F. Supp. 919, 923 (D.D.C. 1993); *Galloway v. Superior Court of the District of Columbia*, Civil Action No. 91–0644, Mem. Op. at 5 (D.D.C. Apr. 21, 1994) (*reprinted in* JA III–12, III–16).

> relevant time period, if in fact applicant has a billing practice to report. This information, when available, will provide important substantiating evidence of the prevailing community rate.... Accordingly, *the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate.*

675 F.2d at 1326 (emphasis added, footnotes omitted). In *Sexcius*, counsel attested to a maximum quoted rate of $187.50 per hour. JA II–71. In *Galloway*, counsel indicated that the maximum rate she had been able to command was $200 per hour. JA III–51. Neither indicated that those rates had been reduced for non-economic reasons. Although the court in *SOCM* held that a lawyer in private practice who reduces his customary rate is not normally limited to that reduced hourly rate in fee awards, the *SOCM* court did not alter the significance under *NACV* of the full, *non-reduced*, rate charged by counsel to other clients.[7]

Together, *NACV* and *SOCM* instruct that a lawyer's usual hourly rate remains the most probative evidence of a reasonable rate to award him under a fee-shifting statute unless that rate does not fairly reflect the value of his services because it is a "reduced rate[ ] reflecting non-economic goals." *SOCM*, 857 F.2d at 1524; *see also NACV*, 675 F.2d at 1326; *Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1569 (D.C. Cir. 1993); *Kattan*, 995 F.2d at 278 (noting "an attorney's usual billing rate is presumptively the reasonable rate"). Resort to a matrix to determine a reasonable rate is thus appropriate only if a lawyer's *ordinary* rate is so reduced; and, if so used,

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[7] I do not question the evidence indicating that some of the lawyers in these cases have reduced their rates for non-economic reasons both in the past and here. I do dispute, however, that a lawyer's billing history can be disregarded in favor of a rate that he has *never* commanded. For example, a lawyer who normally charges $120 per hour to paying clients but agrees to reduce that rate to $100 per hour for non-economic reasons would not, in my view, be entitled under *NACV* or *SOCM* to recover a market rate of $150 per hour.

the matrix must be based on "specific evidence" of "the type of work" for which the lawyer seeks an award. *NACV*, 675 F.2d at 1325.

I would reverse the district court's conclusion that leapfrogged over the applicants' burden and declared instead that *the District* had failed to meet its burden, thereby leaving it, in its view, no alternative but to grant the applicants' requests. *See, e.g., Covington*, 839 F. Supp. at 898. Fee applicants are required to do more than simply ask for an award authorized by statute; they must meet a factually demanding burden. The record contains no evidence that the maximum rates previously charged by the *Sexcius* counsel and by Golden in *Galloway* had been so reduced, making their customary rates the presumptive bases for fee awards to them. *Goos*, 997 F.2d at 1568–69; *Kattan*, 995 F.2d at 278. There is, however, insufficient evidence to evaluate the claims of the other lawyers and law students who participated in the consolidated cases.[8] Accordingly, I would remand to the district court to determine whether each counsel has established a customary, non-reduced rate; if so, that rate should provide the basis of a fee award. I would further instruct the district court to determine a reasonable hourly rate for those lawyers who have not established such a rate. Its determination should be made on the basis of detailed evidence of the type it has already described so well. *Covington*, 839 F. Supp. at 899.

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[8] Although the district court in *Covington* concluded that the District had produced insufficient evidence that counsel's ordinary billing rate of $150 per hour was below market value, 839 F. Supp. at 897, that conclusion was premised on the incorrect market of "complex federal matters," *id.* at 898.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARRYL COVINGTON, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 87-2658 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION

This case comes before this court on plaintiffs' motion for an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Having considered the extensive pleadings and evidence of both parties, this court shall grant plaintiffs' motion.

I. BACKGROUND

The case underlying this attorney's fee litigation was brought by ten inmates of the District of Columbia's correctional facility at Lorton. The inmates alleged that while shackled and handcuffed, they were severely beaten by correctional officers in October 1986. Nine of the inmates further alleged that prison authorities found them guilty of misconduct and sent them to a maximum security facility without proper hearings.

The inmates, who could not afford legal fees, were represented by counsel who took their case on a contingent fee basis. Mr. Daniel Schember and Mr. Michael J. Gaffney of the law firm of Gaffney & Schember, P.C., were lead counsel for plaintiffs. They were aided by Ms. Linda Delaney, a solo

practitioner who participated in discovery, trial preparation and trial; Professor Mark Hager, a professor at American University's Washington College of Law who researched legal questions and identified and interviewed witnesses; Georgetown University Law Center graduates Mr. Darryl Joe and Ms. Tess Ferrera; and law students from American University's Washington College of Law who worked under Mr. Schember's supervision.[1/]

Plaintiffs' counsel handled very well this complicated federal case, which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial. Counsel won partial summary judgment for the nine plaintiffs sent to the maximum security facility, won judicial sanctions against defendants for their failure to respond to requests for admissions and related interrogatories, and took full advantage of certain key facts that defendants were forced to concede. After trial, the jury found for all plaintiffs against all defendants on all issues tried.

After the court denied defendants' motion for judgment notwithstanding the verdict, defendants appealed. The parties settled while the appeal was pending. Under the settlement, defendants paid each plaintiff $25,000 and conceded that plaintiffs were prevailing parties for the purposes of § 1988.

After settling the underlying litigation, the parties negotiated an interim agreement on attorney's fees, approved by this court by an Agreed Order dated December 20, 1991. In the Agreed Order, the parties stipulated as to the number of hours

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[1/]Plaintiffs are not seeking compensation for the work of Mr. Tom Mack, a lawyer then from the firm of Lyons, Mack & Delaney, even though he helped try *Covington*. Mr. Mack's time was traded off in fee negotiations with defendants.

plaintiffs' counsel reasonably spent on the case, and settled plaintiffs' claim for legal expenses incurred up to the date of the Agreed Order.

The parties did not resolve, however, the hourly rates at which counsel should be compensated. Under the Agreed Order, counsel accepted $125-150 per hour -- the rates plaintiffs' counsel ordinarily charged paying clients[2/] -- from defendants for the interim, without conceding that that rate was all that was due. Also unresolved in the Agreed Order was whether defendants must compensate plaintiffs for the market value of the hours reasonably expended by the law students.

The Agreed Order stayed further proceedings in this case pending the Supreme Court's resolution of the issue of contingency fee enhancements.[3/] Because the Supreme Court has since resolved that issue in *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), plaintiffs now seek a final award of attorney's fees.

The issue now before this court is the amount of attorney's fees to which counsel are entitled. Specifically, this court must decide what the reasonable hourly rate for plaintiffs' counsels' legal services is, whether plaintiffs may recover fees for the stipulated time of the law students who worked on this case, whether plaintiffs should receive current or historic

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[2/]The rate Prof. Hager received under the Agreed Order is an exception. Because Prof. Hager lacks any billing history, his $150 per hour interim rate was reached by negotiations between the parties.

[3/]At the time of the Agreed Order, a petition for writ of certiorari in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*) (denying contingency fee enhancements), was pending in the Supreme Court. The Supreme Court has since denied certiorari. *See King v. Ridley*, 112 S. Ct. 3054 (1992).

rates, and whether plaintiffs are entitled to fees for this fee litigation.

II. ATTORNEY'S FEES

A. Counsel

1. Reasonable Hourly Rate

The most difficult issue in this case is establishing the reasonable hourly rate. In § 1988 cases, "the initial estimate of a reasonable attorney's fee" -- the so-called lodestar fee -- "is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (citations omitted). The parties in this case have already stipulated as to the number of hours counsel have reasonably worked on this litigation, and plaintiffs are not seeking any enhancement of the lodestar figure. Thus, the central contested issue in this case is the calculation of a reasonable hourly rate.

Calculating the reasonable hourly rate of lawyers in purely commercial law firms is relatively easy. The reasonable hourly rate of lawyers in purely commercial law firms is presumed to be the rate such lawyers charge paying clients for similar services, within certain parameters. *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24-25 (D.C. Cir. 1984), *overruled in part on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel* [*SOCM*], 857 F.2d 1516, 1520 (D.C. Cir. 1988) (*en banc*). Calculating the reasonable hourly rate of lawyers who lack established billing histories is more difficult. Lawyers working in private legal aid organizations, for example, often do not receive fees for their legal work and

thus necessarily lack any billing history that could serve as their presumptively reasonable rate; for them, a district court must determine the "prevailing market rates in the relevant community," and award counsel that as the reasonable hourly rate. *Blum*, 465 U.S. at 895. In the D.C. Circuit, this latter method of calculation is also used to determine the attorney's fees owed to "privately practicing but public interest motivated attorneys who intentionally charge their poorer clients reduced rates." *SOCM*, 857 F.2d at 1520.

Plaintiffs' counsel argue that they are privately practicing attorneys who charge some of their poorer clients reduced rates out of public interest motives, and defendants have failed to disprove that.[4/] Defendants have not challenged plaintiffs' declarations showing that Gaffney & Schember, P.C., has a history of handling civil rights and civil liberties cases either without charge or at "below-market rates" for non-economic reasons. Nor have defendants countered plaintiffs' evidence that Ms. Delaney similarly charges reduced rates for her legal work out of public interest motives. Most significantly, defendants have not produced enough evidence to show that plaintiffs' counsels' ordinary billing rates -- about $150 per hour -- are not below market value. (This failure is discussed below.) Because plaintiffs' assertions that their counsel have taken public interest cases for below-market rates are reasonably well-documented and virtually unchallenged, this court will take plaintiffs at their word. As public interest but private practice lawyers, plaintiffs' counsel are entitled to receive prevailing market rates for their services. *See SOCM*, 857 F.2d at 1524.

[4/] Instead of contesting the public interest orientation of Gaffney & Schember, P.C., or any of plaintiffs' other legal advisors, defendants have challenged the wisdom of the *SOCM* court's *en banc* decision to trust district courts to weigh the credibility of a fee applicant's affidavit of public interest motivation.

a. Definition of the Relevant Market

As public interest but private practice lawyers, plaintiffs' counsel are clearly entitled to the rates "prevailing in the *relevant* market, *i.e.*, 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (quoting *Blum*, 465 U.S. at 896 n.11) (emphasis added). However, the parties disagree as to which market of legal services is the "relevant market" in this case.

Defendants argue that the relevant market should be narrowly defined as that market of lawyers who represent plaintiffs in civil rights, employment, or discrimination actions. According to defendants, plaintiffs' counsel are entitled to no more than the (allegedly low) fees prevailing in this narrowly defined sub-market of legal services.

Plaintiffs, by contrast, argue that the relevant market should be more broadly defined as the market of lawyers who handle all kinds of complicated federal litigation. This broader market encompasses every complicated federal case handled by District of Columbia lawyers, including not only the small sub-market of lawyers who file civil rights, discrimination, or employment suits but also the sub-market of lawyers who litigate antitrust matters, the sub-market of lawyers who file and defend class actions, etc. Plaintiffs argue that they are entitled to the high fees commanded by lawyers in this broader market.

Defendants' position may be plausible. Although no District of Columbia federal court appears to have spoken squarely on the issue of sub-markets, the legislative history of

§ 1988[5/] and subsequent Supreme Court[6/] and District of Columbia circuit[7/] caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), courts must aim to award attorney's fees that mirror what counsel would earn in the market. If the market would provide different sub-markets[8/] of lawyers different rates, courts properly aiming to mirror the market would award lawyers in each sub-market the fees that their particular services command in the marketplace.

However plausible defendants' theory may be, ruling on its merits will have to wait for another, better litigated case.

[5/] Senate Report No. 94-1011 (1976) indicates that in enacting § 1988, Congress intended attorney fee awards to reflect the prevailing rates that counsel could have earned in the legal market. *See Blum*, 465 U.S. at 893 (citing S. Rep. No. 94-1011, p.6 (1976)).

[6/] In calculating attorney's fees under § 1988, the Supreme Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable.'" *Jenkins*, 491 U.S. at 286.

[7/] The District of Columbia Circuit has long recognized that under fee-shifting statutes, attorneys should be compensated "for the market value of services rendered." *Copeland v. Marshall*, 641 F.2d 880, 894 (D.C. Cir. 1980) (*en banc*).

Further, some District of Columbia caselaw appears to support defendants' sub-market theory more specifically. The Copeland court held that the reasonable hourly rate to be awarded under fee-shifting statutes is the rate "prevailing in the community *for similar work*." *Copeland*, 641 F.2d at 892 (emphasis added). *See also SOCM*, 857 F.2d at 1521 (finding congressional intent to award "rates commensurate with prevailing community standards of attorneys of like expertise *doing the same sort of work in the same area*.") (emphasis added).

[8/] Defendants have not convinced this court that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own. Perhaps a better defined sub-market would include lawyers handling civil rights, employment, or discrimination cases for private defendants, as well.

Defendants have not produced enough evidence in this case to persuade this court that the prevailing rate in the sub-market of plaintiffs' lawyers handling civil rights, employment, and discrimination cases is -- as defendants claim -- lower than the rate prevailing in the broader legal market. Without this evidence, embracing defendants' theory would be mere dicta since this court could not have applied defendants' theory to this case. Perhaps this court will have the chance to reconsider defendants' theory in a future case in which the party opposing fees produces a more thorough evidentiary record.

Unlike defendants, plaintiffs in this case have presented sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters. Plaintiffs' chief evidence is a pair of court-approved matrices. The first of these matrices is an updated *Laffey* fee matrix that has been relied upon, at least in part, by six District of Columbia district judges[9/] and that has received a degree of approval from the Court of Appeals for the District of Columbia Circuit.[10/] The second matrix is one developed by the U.S. Attorney's Office for the District of Columbia that the U.S.

[9/] *See Fischbach v. District of Columbia*, CV 87-646 (D.D.C. Jan. 4, 1993) (Penn, J.); *Robles v. United States*, CV 84-3635 (D.D.C. Jan. 10, 1992) (Flannery, J.); *Trout v. Ball*, 705 F. Supp. 705, 709 n. 10 (D.D.C. 1989) (Harold Greene, J.); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (Oberdorfer, J.); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984) (Richey, J.); *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-75 (D.D.C. 1983) (Robinson, J.), *aff'd*, 746 F.2d 4 (D.C. Cir. 1984), *rev'd on other grounds, SOCM*.

[10/] *See SOCM*, 857 F.2d at 1525 (commending use of *Laffey* matrix). *See also Goos v. National Association of Realtors*, 997 F.2d 1565, 1568 (D.C. Cir. 1993) (*dicta* implying that the *Laffey* matrix is "the schedule (or matrix) of prevailing community rates [that has been] adopted in this circuit.").

The *Laffey* matrix is set forth in Appendix A.

Attorney relies upon in settlements.[11/] Defendants' blunderbuss criticisms of plaintiffs' matrices -- as representing only a small percentage of the District of Columbia's Bar, and as omitting the "lower end of the market" of legal services -- may have merit, but standing alone these criticisms are insufficient to undermine plaintiffs' evidence. *See Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1337-38 (D.C. Cir. 1982) (Tamm, J., concurring).

For their own part, defendants have not presented persuasive evidence that the fees earned by plaintiffs' lawyers in the sub-market of civil rights, employment, and discrimination litigation are lower than the fees earned in the broader market of complicated federal litigation. Defendants' sole affidavit, sworn by Michael E. Zielinski, Assistant Deputy Corporation Counsel, Civil Division (Defs.' Opp'n Ex. B), offers insufficient evidence of this contention. For example, to challenge the rates of plaintiffs' lead counsel, Zielinski's affidavit cites only seven instances in which lawyers with 10-20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $150 per hour is the prevailing rate across the District of Columbia in this sub-market. *See Concerned Veterans*, 675 F.2d at 1325 (parties opposing fee awards have burden of rebutting evidence favoring high fees with "equally specific countervailing evidence . . . tending to show that a lower rate would be appropriate."). *See also id.* at 1337-38

[11/] In the joint stipulation of settlement in *Hodge v. Kemp*, CV 92-1183 (SS) (May 18, 1992) (Pls.' Ex. 27 at ¶3), defendants -- who were represented by the U.S. Attorney's Office -- stated that the U.S. Attorney's Office's matrix sets forth the "prevailing rates in this community."

The matrix prepared by the United States Attorney's Office is set forth in Appendix B.

(Tamm, J., concurring). These seven instances look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour, does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market. Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market.

Defendants' evidence of the rates of those who aided lead counsel in *Covington* is no more persuasive. To establish the prevailing market rates of Ms. Delaney and Prof. Hager, both lawyers of 4-7 years experience, defendants' evidence consists of a single billing rate: Ms. Delaney's. This court cannot assume that a single attorney's billing rate happens to equal the rate prevailing for the work of similar attorneys in the city-wide sub-market of civil rights, employment, and discrimination cases. To establish the prevailing market rates of plaintiffs' counsels' law graduates, Mr. Joe and Ms. Ferrera, defendants point only to one District of Columbia firm that billed its paralegals at $20 per hour (Zielinski Decl. at ¶11) and to another District of Columbia firm -- Gaffney & Schember -- that billed its law graduates' time at $40 per hour. Again, these two instances are insufficient evidence that across the District of Columbia the prevailing market rate for law graduates' work in defendants' proposed sub-market is $20-40 per hour.

In future cases, parties opposing fee awards might come forward with more persuasive evidence. *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within

a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)

Parties seeking fees for legal services performed in a lucrative sub-market -- in the antitrust sub-market, for example -- might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates in order to show that in the marketplace, their counsels' work commands high fees. Parties opposing excessive fee awards for work performed in a less lucrative sub-market might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates to establish that in the marketplace, counsel would have commanded only a modest fee.

In the present case, however, the record is too meager; defendants have simply not produced enough evidence that the prevailing market rate for the proposed sub-market of plaintiffs' civil rights, employment, and discrimination lawyers is only $150 per hour. Because defendants have not carried their evidentiary burden, this court cannot rule for defendants. Because this court cannot rule for defendants, for today plaintiffs' theory that the relevant market should be very

broadly defined still stands. Because plaintiffs have met their evidentiary burden under that theory -- and because defendants' factual rebuttal of plaintiffs' evidence has been ineffectual -- plaintiffs shall be awarded the prevailing market rates for their services in the broadly defined market of complicated federal litigation. This court now turns to the determination of those rates.

b. Prevailing Market Rates for Complicated Federal Litigation

In performing the difficult task of calculating the prevailing market rates for attorney's fees, this court by necessity relies upon the evidence of the prevailing market rates that the parties have produced. *Cf. Concerned Veterans*, 675 F.2d at 1323-24 (noting that attorney's fee cases impose a "difficult burden" on a district court and "correspondingly heavy" evidentiary burdens on fee applicants). In the present case, only plaintiffs have produced sufficient evidence of the prevailing market rates; defendants have produced little persuasive countervailing evidence. In future cases, this court hopes to base its calculations on statistically reliable, well-documented, and extensively surveyed evidence of the sort described above. In the meantime, this court is forced to rely solely upon plaintiffs' unrebutted evidence.

i. Mr. Gaffney and Mr. Schember

The *Laffey* fee matrix and the U.S. Attorney's Office's matrix both award the same 1992-93 rate -- $260 per hour -- to lawyers with Mr. Gaffney's and Mr. Schember's 11-19 years of experience. The *Laffey* matrix charts fees only up to 1988-89 (*see* Appendix A), but plaintiffs have updated the *Laffey* matrix's 1988-89 rates by adopting the extrapolation method employed by the district court in *Robles v. United*

States of America, No. 84-3635 (D.D.C. Jan. 10, 1992). In *Robles*, the district court updated the *Laffey* matrix by adding $10 per hour to the 1988-89 hourly rate of $220 and to the hourly rates of each succeeding year. *See Robles*, slip op. at 16 & n.7. Plaintiffs have followed the *Robles* approach, adding $10 raises to each year after 1988-89 to calculate a current (1992-93) rate of $260 per hour. (Pls.' Application, at 23.)

The U.S. Attorney's Office's matrix also awards counsel with 11-19 years of experience a rate of $260 per hour for 1992-93. The U.S. Attorney's Office extrapolates its matrix by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate, and rounding upwards if the sum is within $3 of the next $5 multiple. (*See* Appendix B, Methodology Note.) Given a Consumer Price Index rate of 3.4 percent, the U.S. Attorney's Office's matrix would award a 1992-93 rate of $260 per hour.

ii. Ms. Delaney and Prof. Hager

Plaintiffs' most up-to-date information on the rates of lawyers with Ms. Delaney's and Prof. Hager's 4-7 years of experience comes from the U.S. Attorney's Office matrix. The *Laffey* fee matrix charts fees only up to 1989.[12/] (*See* Appendix A.) The U.S. Attorney's Office matrix, by contrast, charts fees up to 1992. (*See* Appendix B.) For 1991-92, which is the latest year reported in the U.S. Attorney's Office's matrix, the fee for lawyers of 4-7 years of experience is $165 per hour. Plaintiffs request only $160 per hour for the work of Ms. Delaney and Prof. Hager.

[12/] Although *Robles* updates the *Laffey* matrix's rates for lawyers with 11-19 years of experience, it does not update the rates for lawyers with 4-7 years of experience. *See Robles*, slip op. at 16.

iii. The Law Graduates

If plaintiffs had requested the most current rate in this more current matrix, they could have claimed $125 per hour -- the 1991-92 rate recorded in the U.S. Attorney's Office's matrix -- for the work of their law graduates. Instead, plaintiffs have requested only $85 per hour for their law graduates' time. This court will assume that some factor apparent to plaintiffs justifies the modesty of this request. *Cf. Sierra Club v. E.P.A.*, 769 F.2d 796, 812 (D.C. Cir. 1985).

Because plaintiffs' matrices stand as virtually unrefuted evidence, and because plaintiffs have employed rational methods of updating this evidence to calculate current market rates, this court will award plaintiffs the fees they have requested for Mr. Gaffney, Mr. Schember, Ms. Delaney, Prof. Hager, and the law graduates.

B. Law Students

The next issue this court must address is whether the time spent by law students working for plaintiffs' counsel on *Covington* is compensable under § 1988. For their work on *Covington*, the law students were paid not by salary, but by the promise of a fee contingent upon plaintiffs prevailing on the merits. The parties dispute whether § 1988 permits plaintiffs to claim fees for the time expended by law students who are paid by a contingent fee.

The reasonable hours expended by law students may be compensated under § 1988 only if it is the "prevailing practice" in the District of Columbia's legal market to bill paying clients for such work. *Jenkins*, 491 U.S. at 287. Both parties agree that in the ordinary § 1988 case -- that of a law firm

that pays its law students a salary (even a below-market salary) -- a law firm need only prove what the prevailing market rate is in order to collect that rate for its law students. *See, e.g., In re Donovan*, 877 F.2d 982, 993, 997 (D.C. Cir. 1989) (per curiam); *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. 1989) (awarding compensation for time spent by salaried law clerks). The parties disagree on whether this unusual case -- that of lawyers who pay law students a contingent fee -- differs from the ordinary case in degree or in kind.

Plaintiffs argue that it differs only in degree. According to plaintiffs, a contingent fee is like a salary (perhaps a below-market salary). A law student paid by contingent fee is thus just like a law student paid by salary. In either case, counsel need only establish the prevailing market rate for law students in order to recover it under § 1988. Plaintiffs' matrices, which show the prevailing market rates for law students' labor, meet that evidentiary burden.

Defendants, by contrast, argue that the present case differs in kind from the ordinary case. While defendants recognize that the time of *salaried* law students is commonly billed to paying clients, defendants argue that law students *paid by contingent fee* are another matter entirely. Plaintiffs cannot simply assume that the prevailing practice in the District of Columbia is to bill the hours of law students who are paid by contingent fee in the same way that the hours of salaried law students are billed. Rather, plaintiffs must carry the additional burden of proving that law students paid by contingent fee are commonly billed to paying clients (as well as the ordinary burden of determining what that market value is). Because plaintiffs have failed to establish that it is the prevailing practice to bill paying clients for the work of law students paid by contingent fee, defendants argue that they are not liable for any of the hours expended by the law students.

Plaintiffs' theory is correct in this Circuit. In *Jordan v. United States Dept. of Justice*, 691 F.2d 514, 523-24 (D.C. Cir. 1982), this Circuit found that unpaid law students are different only in degree, not kind, from paid law students for the purposes of fee-shifting statutes. In *Jordan*, the court held that the work of unpaid law students should be compensated at prevailing market rates, rejecting the argument that the law students could recover only the cost of their labor (which is zero when law students work for free). In a decision crucial to this case, the *Jordan* court found that the plaintiffs' sole burden was to establish the "market value of [the law students'] services"; the court did not impose upon plaintiffs the additional burden of proving that the prevailing practice is to bill paying clients for the labor of unpaid law students. *Jordan*, 691 F.2d at 524. Because this Circuit has declined to impose that additional burden on plaintiffs who seek compensation for unpaid law students, this court declines to impose that additional burden on plaintiffs who seek compensation for law students paid by contingent fee.[13/]

Since plaintiffs' matrices have carried plaintiffs' sole burden of establishing the prevailing market rates for law students in the District of Columbia, plaintiffs may collect the prevailing market rate for their law students' time.

Plaintiffs seek compensation for the 347.20 hours[14/] of law student time at the prevailing market rate for law student work on complicated federal litigation, which they claim to be

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[13/]Although *Jordan* predates by years the *Jenkins* Court's requirement that plaintiffs prove that it is the prevailing practice to bill paying clients for law student labor, nothing in *Jenkins* alters the *Jordan* court's view of unpaid and paid law students as different only in kind not degree.

[14/]The parties have already stipulated as to the number of hours the law students reasonably spent on this case.

$70 per hour. Plaintiffs' most current data evidencing the prevailing market rate of law students comes from the U.S. Attorney's fee matrix. (As discussed above, the *Laffey* fee matrix charts fees only up to 1989; the U.S. Attorney's Office's matrix charts fees up to 1992.) Because plaintiffs' evidence is practically unrefuted, and because their fee request is based upon their most current data, this court will award plaintiffs the $70 per hour rate requested for the work of their law students.

C. Current Rates

To compensate for the delay in the payment of their attorney's fees, plaintiffs ask that the final fee award -- both for counsel and for the law students who worked on the case -- be based on current rates rather than historic rates. That is, plaintiffs request prevailing market rates earned by lawyers today, rather than the rates that prevailed in the market when counsel actually worked on *Covington*.

This court clearly has the authority to grant plaintiffs either current or historic rates. Ordinarily, district courts should award historic rates by "simply matching the billing rate governing a particular period to the hours reasonably expended that period." *Laffey*, 746 F.2d at 20 n.104. However, to roughly compensate for delay in payment, a district court has the authority to award current market rates instead of historic market rates,[15] so long as the use of current instead of historic rates would not overcompensate counsel, "generating a windfall for the plaintiff's attorneys."[16]

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[15] *See, e.g., Jenkins*, 491 U.S. at 284; *Laffey*, 746 F.2d at 20 n.104.

[16] *Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C.Cir. 1984).

Generally, to collect current rates plaintiffs must show that the delay in fee payment has produced some degree of hardship such that an award of current rates does not produce a windfall. However, in the present case defendants appear to have conceded plaintiffs' right to receive current rates for work done years ago. By failing to request production for this court of an annual breakdown of the number of hours that plaintiffs' counsel expended on *Covington*, defendants have made it impossible for this court to award historic rates. It is impossible to compute the fee counsel would have earned in the market each year -- *i.e.*, the historic rates -- without knowing how many hours plaintiffs' counsel expended in each year of the *Covington* litigation. Defendants could have discovered this information from plaintiffs by filing with this court a motion for leave to conduct discovery necessary to file its brief in opposition. By failing to provide this court with the information necessary for it to award historic rates, defendants appear to have conceded plaintiffs' right to current rates. Accordingly, this court will award plaintiffs current rates for all hours expended on the underlying litigation of *Covington*.

D. Fees for Fee Litigation

The final issue before this court is whether plaintiffs' counsel are entitled to fees for litigating this fee petition. Plaintiffs have provided detailed records for Mr. Gaffney (Gaffney Decl. at App. Ex. D (claiming 62.7 hours)); Mr. Schember (Schember Decl. at ¶12 (claiming 12.1 hours)); and a law clerk (Gaffney Decl. at App. Ex. E (claiming 27.6 hours)) recording time reasonably spent on this fee litigation as of the date of the motion for fees.

Plaintiffs are entitled to compensation from defendants for all hours reasonably expended on this fee petition. *See Sierra*

Club, 769 F.2d at 811; *Environmental Defense Fund v. EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982). Because defendants have conceded the reasonableness of the hours claimed in the original motion, and because plaintiffs' counsels' declarations regarding these claimed hours are sufficiently detailed, this court will not independently scrutinize the hours claimed. Instead, this court will assume that when the number of hours is uncontested, some factor apparent to the parties justifies the number of hours counsel claims. *See Sierra Club*, 769 F.2d at 812.

Although defendants concede that the claimed time expended on this fee litigation is a reasonable amount, defendants dispute their liability for that time. Defendants contend -- without citing any statutory provision or case law in support -- that if plaintiffs do not "prevail[]" on their request for attorney's fees, plaintiffs may not be awarded attorney's fees for the fee litigation. Even under defendants' novel theory, plaintiffs still could collect fees for this fee litigation. Plaintiffs are indeed prevailing on their motion for fees *per* this memorandum opinion. Plaintiffs' counsel are entitled to a reasonable hourly rate for all the hours they claim they have reasonably expended on the fee litigation itself.

This court also grants plaintiffs leave to submit a supplemental motion to request compensation for reasonable time spent on this fee litigation since the filing of the original motion.

III. CONCLUSION

For litigating the merits of *Covington*, plaintiffs are awarded fees in accordance with the chart below:

Attorney	*Hours*	*Prevailing Market Rate*	*Amount*
Schember	930.64	$260 per hour	$241,966.40
Gaffney	65.70	$260 per hour	$17,082.00
Delaney	303.11	$160 per hour	$48,497.60
Hager	38.50	$160 per hour	$6,160.00
Law Graduates	43.85	$85 per hour	$3,727.25
Law Students	347.20	$70 per hour	$24,304.00
Total Fees for Merits			$341,737.25

For litigating this fee petition, plaintiffs are awarded fees in accordance with the chart below (subject to change upon the filing of a supplemental motion requesting compensation for reasonable time spent on this fee litigation since the filing of the original motion):

Attorney	*Hours*	*Prevailing Market Rate*	*Amount*
Schember	12.1	$260 per hour	$3,146.00
Gaffney	62.7	$260 per hour	$16,302.00
Law Clerk	27.6	$70 per hour	$1,932.00
Fees for Fee Litigation			$21,380.00

In sum, plaintiffs are awarded attorney's fees as follows:

Total Fees for Merits	$341,737.25
Less Interim Fee Award	($194,868.00)
Fees for Fee Litigation[17/]	$21,380.00
Total Fees to be Awarded by this Order	$168,249.25

[17/] This portion of the award may be amended after the filing of a supplemental motion requesting compensation for reasonable time spent on this fee litigation since the filing of the original motion.

Plaintiffs are hereby awarded $168,249.25 in attorney's fees.

A separate order shall issue this date.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: December 13, 1993

APPENDIX A: LAFFEY MATRIX

EXPERIENCE OF ATTORNEY YEARS[1/] (Hourly Rates)

	1980 -81	1981 -82	1982 -83	1983 -84	1984 -85	1985 -86	1986 -87	1987 -88	1988 -89
Very experienced federal litigators (20+ years):	$165	$175	$190	$200	$210	$225	$240	$255	$265
Experienced federal litigators (11th thru 19th years):	$140	$150	$160	$170	$180	$190	$200	$210	$220
Experienced litigator (8th thru 10th years):	$115	$125	$135	$145	$155	$165	$175	$185	$195
Senior associates (4th thru 7th years):	$95	$100	$105	$110	$115	$120	$125	$130	$135
Junior associates (1st thru 3rd years):	$70	$75	$80	$85	$90	$95	$100	$105	$110
Paralegals/Law Clerks:	$30	$35	$40	$45	$50	$55	$55	$60	$60

[1/] June 1 - May 31

APPENDIX B: U.S. ATTORNEY'S OFFICE'S MATRIX

Years (Rate for June 1 - May 31, based on prior year's CPI)

EXPERIENCE	80-81	81-82	82-83	83-84	84-85	85-86
20+ Years	165	175	185	195	205	210
11-19 Years	140	150	160	170	180	185
8-10 Years	120	125	130	135	140	145
4-7 Years	95	100	105	110	115	120
1-3 Years	70	75	80	85	90	95
Paralegals/ Law Clerks	30	35	35	40	40	45

EXPERIENCE	86-87	87-88	88-89	89-90	90-91	91-92
20+ Years	220	230	245	260	275	285
11-19 Years	190	200	210	225	240	250
8-10 Years	150	155	165	175	185	195
4-7 Years	125	130	140	150	160	165
1-3 Years	100	105	110	115	120	125
Paralegals/ Law Clerks	50	55	60	65	70	75

Methodology note: *Laffey*, decided in 1982, set fees for work done in 1981-82. The fees in this matrix are calculated by adding Consumer Price Index (Washington, D.C. Metropolitan Area) increase to the applicable *Laffey* rate for the prior year, then rounding (up, if within $3 of the next multiple of $5).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARRYL COVINGTON, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 87-2658 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

ORDER

This matter comes before this court on plaintiffs' motion for an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Upon consideration of the pleadings and evidence of both parties, it is hereby, for the reasons set forth in an accompanying memorandum opinion,

ORDERED that plaintiffs' motion for an award of attorney's fees is granted, and it is further

ORDERED that defendants shall, within forty-five days of the date of this order, pay plaintiffs attorney's fees in the amount of $168,249.25, and it is further

ORDERED that plaintiffs shall, within twenty days from the date of this order, file a supplemental motion for award of attorney's fees incurred since the date of plaintiffs' motion for an award of attorney's fees and for expenses, unless a settlement between the parties before then obviates the need to file such a supplemental motion.

SO ORDERED.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIEL SEXCIUS, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 88-2104 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION

This case comes before this court on plaintiffs' motion for an award of attorney's fees and costs under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Having considered the extensive memoranda and evidence of both parties, this court shall grant plaintiffs' motion, awarding plaintiffs $247,809.87 in attorney's fees and costs. A separate order shall issue this date.

I. BACKGROUND

The case underlying this attorney's fee litigation is an action alleging the violation of First and Fourteenth Amendment rights of two District of Columbia schoolteachers, Sheriel Sexcius and William Edmead, who had spoken out regarding certain educational practices. Attorneys Francine K. Weiss and Edith Barnett represented the teachers, working together in this case as they had long done on other cases.[1/] Ms. Weiss was lead counsel and the point of contact between plaintiffs and counsel and witnesses. (She and Ms. Barnett

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[1/] Ms. Barnett left private practice in late 1991 to become an Administrative Law Judge at the United States Department of Labor.

were aided by three law students, who helped organize documents and research.)

Ms. Weiss and Ms. Barnett won for their clients a permanent injunction forbidding Woodson High School Principal Lucile Christian, Director of the Public School Certification and Accreditation Branch Mary B. Hendrick, the superintendent of schools, the District of Columbia, and the mayor from infringing on plaintiffs' constitutional rights and from retaliating against plaintiffs in the workplace again for speaking out on their educational views. In an order accompanying the resolution of the merits of plaintiffs' claim, this court determined that plaintiffs are entitled to reasonable attorney's fees and costs. *See Sexcius v. District of Columbia*, No. 88-2104, slip op. at 52 (D.D.C. Oct. 15, 1992). The issue now before this court is what constitutes reasonable attorney's fees and costs in this case.

II. ATTORNEY'S FEES

"The initial estimate of a reasonable attorney's fee" -- the so-called lodestar fee -- "is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (citations omitted).[2/] To determine the lodestar, this court will determine, in turn, the reasonable hourly rate and the reasonable number of hours billed by counsel.

[2/]This lodestar fee may also be adjusted when necessary in a particular case. *See Blum*, 465 U.S. at 888. In the present case, however, plaintiffs do not seek any lodestar adjustments.

A. Counsel

1. Reasonable Hourly Rate

Plaintiffs claim compensation at a billing rate of $260 per hour, which is (they claim) the prevailing market rate for lawyers with their legal experience. Defendants argue that the appropriate rate is no more than $100 per hour, the rate that plaintiffs paid their counsel throughout this litigation under a retainer agreement. Because plaintiffs' counsel charged plaintiffs this low $100 rate out of public interest motives, plaintiffs are entitled to collect the prevailing market rate, not merely the rate they actually charged plaintiffs.

a. Counsel Charged Reduced Rates in the Public Interest

Plaintiffs' counsel have a tradition of charging their less wealthy clients below-market rates when their cases are important to the public interest. In the present case, for example, because plaintiffs were public school teachers -- in the words of their counsel, "not wealthy people" -- their counsel agreed to charge them only $100 per hour, a "rate[] they could afford." (Defendants have conceded that this $100 rate is below the market rate.)[3/] Counsel charged them this reduced rate in order to take plaintiffs' case, which posed important constitutional questions and affected the educational interests of the city's public school students. (Barnett Decl. (Reply) at ¶6; Weiss Decl. (Reply) at ¶7.)

[3/]According to defendants' evidence, the prevailing market rates of lawyers with more than ten years of litigation experience who handle civil rights and employment discrimination cases in this community were $125 to $150 per hour in 1992. (Zielinski Decl. *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), Opp'n Mem. Ex. B.)

This is not an atypical case for plaintiffs' counsel. They have a tradition of representing the constitutional and statutory rights of individual employees and employee groups, including labor unions. Because counsel earn their living from their practice, they cannot afford to represent their clients for free. (Weiss Decl. (Reply) at ¶8; Barnett Decl. (Reply) at ¶5.) Instead, they represent their worthy but not wealthy clients at below-market rates. Lawyers who make this kind of noble compromise may recover prevailing market rates for their work. *See Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1520 (D.C. Cir. 1988) (*en banc*) (*SOCM*). Because plaintiffs have shown that their counsel charge below-market rates out of public-spirited motives, plaintiffs are entitled to recover the prevailing market rate for their counsels' services.

b. Prevailing Market Rate

Although plaintiffs are clearly entitled to a fee award calculated at the rates prevailing in the relevant legal market,[4/]

[4/] *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989). Plaintiffs' counsels' established billing rates -- if counsel have such -- are not directly relevant to the determination of the fee award. *See SOCM*, 857 F.2d at 1524.

For this reason, defendants' reliance on *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), is misplaced. In *Kattan*, the parties believed that under the statute in question (20 U.S.C. § 1415(e)(4)(C), the fee-shifting provision of the Handicapped Children's Protection Act), "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kattan*, 995 F.2d at 278 (citations omitted). This is a restatement of the *Laffey* test for fixing fee awards. *See Laffey*, 746 F.2d 4, 24-25 (D.C. Cir. 1984).

The *en banc SOCM* court overruled this *Laffey* test with respect to counsel like Ms. Weiss and Ms. Barnett. Where (as here) counsel charge below-market rates

(continued...)

the parties disagree as to which market of legal services is the "relevant market" in this case.

Plaintiffs argue that the matrices and other evidence they have produced, charting the rates charged by lawyers across the District of Columbia for complicated federal litigation, establish the prevailing market rate. This matrix-based evidence would award counsel $260 per hour.

Defendants challenge plaintiffs' matrix-based evidence as too broad to be useful. Plaintiffs' matrices and other evidence survey rates that District of Columbia lawyers earn from commercial clients for performing "general legal services," rates far higher than those the market awards for plaintiffs' civil rights work. (Defs.' Opp'n, at 11.) Ms. Weiss might earn $260 per hour from a commercial client for her general legal services; for her civil rights work for plaintiffs, by contrast, the market would provide her no more than $125-$150 per hour,[5] defendants argue.

Defendants' position may be plausible. As discussed in *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), no District of Columbia federal court appears to have spoken squarely on the issue of sub-markets, but the

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[4](...continued)
out of public interest motives, the "reasonable hourly rate" is properly calculated not according to the hourly rates that counsel have actually charged in similar cases, but according to "rates that reflect the prevailing community rate for similar legal services." *SOCM*, 857 F.2d at 1517. Counsels' usual billing rate is thus not directly relevant.

[5]This range is based on defendants' evidence. Defendants have submitted seven instances in which lawyers who performed civil rights work for plaintiffs had established billing rates between $125 and $150 per hour.

legislative history of § 1988[6/] and subsequent Supreme Court[7/] and District of Columbia circuit[8/] caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), courts must aim to award attorney's fees that mirror what counsel would earn in the market. If the market would provide different sub-markets[9/] of lawyers different hourly rates, courts properly aiming to mirror the market would award fees accordingly, granting lawyers in each sub-market the fees that their particular services command in the marketplace.

[6/] Senate Report No. 94-1011 (1976) indicates that in enacting § 1988, Congress intended attorney fee awards to reflect the prevailing rates that counsel could have earned in the legal market. *See Blum*, 465 U.S. at 893 (citing S. Rep. No. 94-1011, p.6 (1976)).

[7/] In calculating attorney's fees under § 1988, the Supreme Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable.'" *Jenkins*, 491 U.S. at 286.

[8/] The District of Columbia Circuit has long recognized that under fee-shifting statutes, attorneys should be compensated "for the market value of services rendered." *Copeland v. Marshall*, 641 F.2d 880, 894 (D.C. Cir. 1980) (*en banc*).

Further, some District of Columbia caselaw appears to support defendants' sub-market theory more specifically. The *Copeland* court held that the reasonable hourly rate to be awarded under fee-shifting statutes is the rate "prevailing in the community *for similar work*." *Copeland*, 641 F.2d at 892 (emphasis added). *See also SOCM*, 857 F.2d at 1521 (finding congressional intent to award "rates commensurate with prevailing community standards of attorneys of like expertise *doing the same sort of work in the same area.*") (emphasis added).

[9/] Defendants have not convinced this court that lawyers handling civil rights, employment, or discrimination cases for plaintiffs constitute a sub-market of their own. Perhaps a better defined sub-market would include lawyers handling civil rights, employment, or discrimination cases for private defendants, as well.

Unfortunately, the resolution of the parties' debate in this case is no more satisfying than the resolution of the District of Columbia's identical debate with the plaintiffs in the *Covington* case. Defendants have produced exactly the same evidence in both cases. In that case, as in this one, defendants' evidence is not sufficient to persuade this court that the prevailing rate in the sub-market of plaintiffs' lawyers handling civil rights, employment, and discrimination cases is -- as defendants claim -- lower than the rate prevailing in the broader market of complicated federal litigation.[10/] Because defendants have not carried their evidentiary burden, this court cannot rule for defendants. Because this court cannot rule for defendants, for today plaintiffs' theory that the relevant market

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[10/] Defendants' sole affidavit, sworn by Michael E. Zielinski, Assistant Deputy Corporation Counsel, Civil Division (Opp'n Mem. Ex. B), offers insufficient evidence of this contention.

To challenge plaintiffs' counsels' rates, Zielinski's affidavit cites only seven instances in which lawyers with 10-20 years of experience charged $125 to $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. Standing alone, these seven instances are insufficient to demonstrate that $125-$150 per hour is the prevailing rate across the District of Columbia in this sub-market. *See Nat'l Ass'n of Concerned Veterans v. Sec. of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (per curiam) (parties opposing fee awards have burden of rebutting evidence favoring high fees with "equally specific countervailing evidence . . . tending to show that a lower rate would be appropriate.") *See also id.*, 675 F.2d at 1337-38 (Tamm, J., concurring).

These seven instances look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour, does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market. Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded in their proposed sub-market.

should be very broadly defined still stands.[11/] Because plaintiffs have met their evidentiary burden under that theory -- and because defendants' factual rebuttal of plaintiffs' evidence has been ineffectual -- plaintiffs shall be awarded the prevailing market rates for their services in the broadly defined market of complicated federal litigation. This court now turns to the determination of those rates.

[11/]Ruling on the merits of defendants' theory will have to wait for another, better litigated case in which the party opposing fees produces a more thorough evidentiary record. The *Covington* decision's guidance as to what might constitute a better documented case bears repeating:

> "In future cases, parties opposing fee awards might come forward with more persuasive evidence. *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market. (Ideally, the survey would also indicate what fraction of clients pay which rates within the sub-market's rate spectrum. That is, the survey would state what fraction of the sub-market's clients take their cases to high-priced firms, what fraction to low-priced firms, and what fraction to firms priced in the middle. This would help the court determine whether any given rate is typical or aberrant.)
>
> Parties seeking fees for legal services performed in a lucrative sub-market -- in the antitrust sub-market, for example -- might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates in order to show that in the marketplace, their counsels' work commands high fees. Parties opposing excessive fee awards for work performed in a less lucrative sub-market might proffer a statistically reliable, well-documented, and extensive survey of that sub-market's rates to establish that in the marketplace, counsel would have commanded only a modest fee."

Covington v. District of Columbia, No. 87-2658 (D.D.C. Dec. 13, 1993).

In performing the difficult task of calculating the prevailing market rates for attorney's fees, this court by necessity relies upon the parties' evidence of the prevailing market rates. *See Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1323-24 (D.C. Cir. 1982) (per curiam) (noting that attorney's fee cases impose a "difficult burden" on a district court and "correspondingly heavy" evidentiary burdens on fee applicants). Defendants' blunderbuss criticisms of plaintiffs' matrices -- as representing only a small percentage of the District of Columbia's Bar, as omitting the "lower end of the market" of legal services, and as failing to reflect the recent slowdown in the growth of rates -- may have merit, but standing alone these criticisms are insufficient to undermine plaintiffs' evidence. *See Concerned Veterans*, 675 F.2d at 1337-38 (Tamm, J., concurring). Because defendants have produced little helpful countervailing evidence and because plaintiffs' evidence -- though not entirely satisfying -- is more persuasive, this court is forced to rely solely upon plaintiffs' evidence.

Plaintiffs' chief evidence is a pair of court-approved matrices. The first of these matrices -- the *Laffey* matrix -- is an updated fee matrix that has been relied upon, at least in part, by six District of Columbia district judges[12/] and that has received a degree of approval from the Court of Appeals for

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[12/] *See Fischbach v. District of Columbia*, No. 87-646 (D.D.C. Jan. 4, 1993) (Penn, J.); *Robles v. United States*, No. 84-3635 (D.D.C. Jan. 10, 1992) (Flannery, J.); *Trout v. Ball*, 705 F. Supp. 705, 709 n. 10 (D.D.C. 1989) (Harold Greene, J.); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (Oberdorfer, J.); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984) (Richey, J.); *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-75 (D.D.C. 1983) (Robinson, J.), *aff'd*, 746 F.2d 4 (1984), *rev'd on other grounds, SOCM*.

the District of Columbia Circuit.[13/] The second matrix -- developed by the U.S. Attorney's Office for the District of Columbia for use in negotiating settlements[14/] -- extrapolates from the 1981-82 rates set by the *Laffey* court in 1982[15/] by adding the Consumer Price Index increase for the Washington, D.C., metropolitan area to the prior year's rate, and rounding upwards if the sum is within $3 of the next $5 multiple. (*See Covington*, Appendix B, Methodology Note.) The rate for 1991-92, the last fee year charted by the U.S. Attorney's Office's matrix, is $250 per hour. (*See Covington*, Appendix B.) Plaintiffs follow the U.S. Attorney's Office's extrapolation method to calculate a 1992-93 hourly rate of $260.[16/] Relying upon plaintiffs' inadequately rebutted (but not unrebuttable) evidence, this court finds that the prevailing market rate for 1993 is $260 per hour.

[13/] *See SOCM*, 857 F.2d at 1525 (commending use of *Laffey* matrix). *See also Goos v. National Association of Realtors*, 997 F.2d 1565, 1568 (D.C. Cir. 1993) (*dicta* implying that the *Laffey* matrix is "the schedule (or matrix) of prevailing community rates [that has been] adopted in this circuit.").

The matrix is set forth in *Covington v. District of Columbia*, No. 87-2658 (D.D.C. Dec. 13, 1993), Appendix A.

[14/] This matrix is set forth in *Covington*, Appendix B.

[15/] *See Laffey*, 572 F. Supp. at 371.

[16/] Plaintiffs multiply $250 per hour by the 3.4 percent rate of the Metropolitan Area Consumer Price Index, add that to the matrix's 1991-92 rate of $250 per hour, and round up to the nearest $5 increment. (Pls.' Application, at 3.)

Defendants claim that legal rates are not rising in the current market, and they challenge plaintiffs' annual escalation of rates. However, defendants have not submitted enough persuasive evidence for this court to rule in its favor on this point. Defendants have submitted salary charts from the *Legal Times* which show that although many firms did not raise their rates every year between 1989 and 1992, some firms increased their rates by more than $25 per hour per year.

c. Retainer Provision

Defendants' final argument against plaintiffs' requested $260 hourly rate stems from defendants' interpretation of a provision of the retainer agreement between plaintiffs and their counsel. Under the retainer agreement, plaintiffs paid their counsel only $100 per hour for their time on this case, and plaintiffs and their counsel agreed that any portion of a fee award that exceeds "the amount of fees actually incurred by the clients" shall be remitted to the clients. Believing this provision to award plaintiffs any portion of the award that exceeds the $100 hourly rate that plaintiffs paid their counsel under the agreement, defendants argue that awarding any rate higher than that $100 rate would grant plaintiffs an impermissible windfall and violate the bar of *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), against awarding fees to *pro se* plaintiffs.

Defendants have misconstrued the retainer agreement. It does not remit to plaintiffs any fraction of this fee award that exceeds the amount plaintiffs have already paid their counsel, as defendants claim. Rather, it simply prevents counsel from receiving double payment for their services. The agreement guarantees that counsel will not collect both the court's award of fees for their work and plaintiffs' payment of fees to them for that same work. Under the agreement, once counsel have in hand both the court's fee award and the fees paid to them by plaintiffs, counsel must subtract from that combined amount the "fees actually incurred by the clients" -- *i.e.*, the hours counsel worked for plaintiffs multiplied by the reasonable hourly rate -- and remit the difference to plaintiffs. In short, the retainer agreement ensures that counsel receive only what they have earned (or more precisely, what they would have earned if they had charged market rates).

This is the understanding of this provision shared by plaintiffs[17/] and their counsel.[18/] Nothing in the provision prevents this court from awarding plaintiffs a rate higher than $100 per hour.

2. Reasonable Number of Hours Expended

Plaintiffs request compensation for the hours they expended on this case, including time expended litigating this fee petition. (A reasonable fee for time reasonably expended on fee applications is recoverable. *See, e.g., Sierra Club v. E.P.A.*, 769 F.2d 796, 811 (D.C. Cir. 1985); *Environmental Defense Fund v. E.P.A.*, 672 F.2d 42, 62 (D.C. Cir. 1982).) Defendants argue that these claimed hours should be cut by five percent, mainly because plaintiffs did not support with specific examples their assertions that they used sound billing judgment.

Yet plaintiffs' counsel did use good billing judgment, well-documented for this court's review. (Weiss Decl. (Application) at ¶12; Barnett Decl. (Application) at ¶1.) For example, Ms. Weiss reduced her bills by about twenty hours in October 1988 when she felt that her daughter's hospitalization distracted her and made her less efficient. Ms. Weiss also carefully billed the 17.05 hours she spent doing paralegal work -- drafting and updating a chronology of events, summarizing documents, organizing documents and preparing exhibits -- at paralegal rates, not at her own higher rates. (Weiss

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[17/] Sexcius Decl. (Reply) at ¶1; Edmead Decl. (Reply) at ¶1.

[18/] Barnett Decl. (Reply) at ¶2.

Decl. (Application) at ¶12.)[19/] Defendants charge that time plaintiffs' counsel billed for meetings between Ms. Weiss and Ms. Barnett is duplicative, yet at these meetings counsel tried to coordinate plaintiffs' litigation strategies for efficiency. In any event, Ms. Weiss has not billed for at least twenty hours of the time she spent conferring with Barnett. Lastly, in plaintiffs' application counsel deleted all non-billed and non-billable matters. For example, counsel also did not charge for the two hours spent conferring with another attorney who was also litigating against the District of Columbia. Nor did Ms. Weiss charge for about twelve hours she spent calling plaintiffs, witnesses, or Ms. Barnett from home.

In short, plaintiffs' counsel used sound billing judgment and documented their billing decisions well enough for this court to confirm that. Plaintiffs may recover fees for all of their time.

B. Law Clerks

For the services of their counsels' law clerks and for the time that Ms. Weiss spent doing law-clerk-type chores, plaintiffs claim $5,228.00, for 65.35 hours at $80 per hour. (Reply Ex. 1.)

The work of paralegals and law clerks is compensable, as part of a "reasonable attorney's fee," according to the practice prevailing the legal community. *See Jenkins*, 491 U.S. at

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[19/]Defendants contend that Ms. Weiss should also have billed at paralegal rates her time spent summarizing depositions. Although Ms. Weiss did bill only at paralegal rates for her time spent summarizing documents generally, the work of reviewing and summarizing the depoaition testimony of important witnesses is different, especially as counsel is a small firm that cannot delegate such tasks to junior lawyers. Ms. Weiss deserves to be compensated at her higher rates for this work.

285-87. The prevailing practice in the District of Columbia is for lawyers to bill clients for the work of their law clerks at the prevailing market rate.[20/] Plaintiffs have submitted reasonably persuasive, effectively unrebutted, evidence that the current prevailing market rate for law clerks in the District of Columbia is $80 per hour. (The hourly rate plaintiffs claim -- $80 per hour -- is the rate that the U.S. Attorney's matrix would award for the year 1992-93 if the matrix were extended to this year according to the matrix's own extrapolation method.)[21/] Plaintiffs have documented the time of their law students and of Ms. Weiss in sufficient detail, listing services performed by date and time. (Reply Ex. 6). Thus, plaintiffs may recover their requested fees for their law clerks.

C. Current Rates

Plaintiffs request a fee award calculated at current, not historical, rates. Because awarding current rates may mitigate the hardship of the seven years' delay between the first billing in this case and final payment,[22/] plaintiffs shall be compensated at current market rates.

[20/] *See, e.g., In re Donovan*, 877 F.2d 982, 993, 997 (D.C. Cir. 1989) (per curiam); *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. 1989).

[21/] Defendants make the same objections to this $80 per hour matrix-based rate that they made to plaintiffs' counsel's $260 per hour matrix-based rate. Yet defendants have submitted only two instances in which District of Columbia lawyers requested less than $80 per hour for the work of paralegals or law clerks, insufficient evidence that the prevailing market rate for the work of paralegals or law clerks across the District of Columbia is less than $80 per hour.

[22/] Plaintiffs have been incurring fees since late 1987. No interim settlement of attorney's fees or costs provided plaintiffs with more timely compensation.

III. COSTS

Plaintiffs seek an assortment of out-of-pocket costs incurred in the course of this litigation, and the question before this court is which of these costs Congress has authorized this court to shift to defendants. In § 1988, Congress has authorized the shifting of only those out-of-pocket costs that are customary elements of an "attorney's fee"; in 28 U.S.C. § 1920, Congress has authorized the shifting of other out-of-pocket costs. This court may shift only those costs that fit into one of these two categories.[23/]

The former category -- encompassing all customary elements of an "attorney's fee" -- includes all those out-of-pocket expenses that have "traditionally been included in calculations of the lawyers' hourly rates," including those out-of-pocket costs that many lawyers have recently removed from their hourly rates and now bill separately to the client.[24/]

[23/] In *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1141 (1991), the Supreme Court used this two-part analysis to determine whether § 1988 permitted fees for experts' nontestimonial services to be shifted to a losing party. First, the Court found that "none of the categories of expense listed in § 1920 can reasonably be read to include" fees for experts' nontestimonial services. 111 S. Ct. at 1141. Second, the Court determined that "the phrase 'attorney's fees' [does not] embrac[e] fees for experts' services." *Id.* at 1146. Because fees for experts' nontestimonial services fell into neither category, the Court concluded that courts lacked power to shift those fees.

[24/] *West Virginia*, 111 S. Ct. at 1147. *See also Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (defining the term "attorney's fees" to include out-of-pocket expenses that are "'incidental and necessary expenses incurred in furnishing effective and competent representation' [and] those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.") (citations omitted).

Other statutes, notably 28 U.S.C. § 1920, determine which items of expense are included in the latter category.[25] These include "those costs incurred by a party to be paid to a third party, not the attorney for the case, . . . including, among others, docket fees, investigation expenses, deposition expenses, witness expenses, and the costs of charts and maps." *Northcross*, 611 F.2d at 639.

A. Costs Incurred by Plaintiffs' Counsel

Plaintiffs claim reimbursement for two sets of expenses incurred in this litigation: costs their counsel incurred, and costs plaintiffs themselves incurred. Under the first heading, plaintiffs claim compensation for costs of deposition transcripts, subpoenas, photocopying, postage, complaint filing fee, long distance telephone calls, messenger service, and local transportation and parking that their counsel incurred litigating *Sexcius*.

1. Costs Traditionally Included in an "Attorney's Fee"

Reasonable photocopying, postage, long distance telephone, messenger, and transportation and parking costs are customarily considered part of a reasonable "attorney's fee."[26] If

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[25] *See West Virginia*, 111 S. Ct. at 1141 & n.3 (restating holding of *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), that § 1920 and other statutes "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further.").

Other statutes further define some of the terms of § 1920. For example, 28 U.S.C. § 1821(b) caps the per diem amount that may be taxed for "witnesses" (including expert witnesses) under § 1920(3).

[26] *See, e.g., Jenkins*, 491 U.S. at 285 (including the cost of secretaries and messengers in a reasonable attorney's fee); *Northcross*, 611 F.2d at 639 (including

(continued...)

plaintiffs' request for these costs are sufficiently well-documented and reasonable, plaintiffs may recover these out-of-pocket expenses pursuant to the statutory authority of § 1988 to shift "attorney's fees."

Defendants have conceded that the amounts plaintiffs have claimed in photocopying, postage, and long distance telephone calls costs are "reasonable expenses." (Defs.' Opp'n, at 25.) However, defendants do challenge plaintiff's counsels' travel expenses and messenger service expenses as insufficiently documented. (Defs.' Opp'n, at 26.) Defendants are correct that plaintiffs' original request for messenger service costs was too high. However, in their reply memorandum, plaintiffs eliminated all hourly messenger charges and requested compensation for only the remaining standard fees. (Reply Ex. 10.) These standard fee charges are well-documented and reasonable, and plaintiffs may recover them.

Similarly, in their application, plaintiffs claimed $123.60 for their counsels' local transportation and parking costs. After defendants challenged this amount as unsupported, plaintiffs cut from their request all but the well-documented costs, requesting only $108.50 in charges listed by date and amount. Plaintiffs may recover this reduced amount.

2. Costs Shifted by § 1920

The costs associated with deposition transcripts are clearly compensable under § 1920(4), if the costs are reasonable, the expenditures well-documented, and the depositions "necessarily obtained for use in the case." 28 U.S.C. § 1920(4).

26/(...continued)
photocopying, travel, and telephone costs as customary elements of an attorney's fee).

See Robertson v. McCloskey, 121 F.R.D. 131, 134 (D.D.C. 1988) ("costs associated with taking depositions" are taxed under § 1920(4) as transcripts "necessarily obtained").

Because defendants have conceded that plaintiffs' deposition transcript costs are "reasonable,"[27] and because the costs of the deposition transcripts are well-documented, plaintiffs may recover their claimed deposition costs. Plaintiffs may also recover their claimed filing fees.

3. Costs that Cannot be Shifted

Plaintiffs' subpoena costs may not be shifted to defendants. The cost of subpoenas is not a customary element of an attorney's fee, and it is clearly not taxed under § 1920.[28]

B. Costs Incurred by Plaintiffs Themselves

Plaintiffs also seek compensation for a second category of costs: the costs incurred not by counsel, but by plaintiffs themselves. Plaintiffs themselves paid out-of-pocket for some of the photocopying and postage costs of their case, incurred some travel expenses going to and from litigation-related events, and lost a portion of their wages while litigating this case.

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[27] Defs.' Opp'n, at 25.

[28] *See Zdunek v. Washington Metropolitan Area Transit Authority*, 100 F.R.D. 689, 692 (D.D.C. 1983) (cost of hiring special process servers to serve subpoenas not a taxable cost). *See also* 10 Wright & Miller, *Federal Practice and Procedure* § 2677, at 371-72 (1983).

1. Costs of Photocopying, Postage, and Travel

In order to save money, plaintiffs' counsel recruited plaintiffs themselves to review and forward new documents to Ms. Weiss and to interview potential witnesses. In doing these tasks, plaintiffs incurred some photocopying and postage costs that their counsel could have incurred had counsel done the tasks in the first place. (Weiss Decl. (Application) at ¶14.)

Because reasonable photocopying and postage are customarily considered part of a reasonable "attorney's fee," plaintiffs' out-of-pocket expenses would clearly be compensable if their counsel had incurred them first and then billed these costs to plaintiffs. *See Northcross*, 611 F.2d at 639. Denying plaintiffs compensation for these costs would force clients in the future to insist on the senseless formality of having their counsel incur out-of-pocket costs first (perhaps at higher expense) and bill them afterwards. Plaintiffs' requests for reimbursement of photocopying and postage costs are well-documented, and defendants concede the amounts claimed are "reasonable." (Defs.' Opp'n, at 25.) Plaintiffs may recover their out-of-pocket photocopying and postage costs.

However, plaintiffs may not recover their travel expenses. In her declaration, Ms. Weiss states that plaintiffs also incurred "travel" costs in the course of reviewing and forwarding new documents to counsel and interviewing potential witnesses. (Weiss Decl. (Application) at ¶14). If this were true -- if, for example, plaintiffs had incurred travel costs running about town doing the sort of work that their lawyers would have done if plaintiffs themselves had not -- plaintiffs would have a plausible claim. They might have persuasively argued that they were simply incurring travel costs that their counsel would have billed to them anyway, had counsel performed the travel themselves.

However, the travel costs claimed by plaintiffs appear to be costs for which their counsel could never have billed them. Plaintiffs claim compensation for transportation and parking associated with court hearings and depositions, events that their counsel undoubtedly attended as well. (Pls.' Ex. 9 (Reply) at ¶B.) In this instance, plaintiffs were clearly not incurring costs in their counsels' stead. Rather than seeking compensation for the type of costs routinely incurred by lawyers and billed to clients, plaintiffs are attempting to claim compensation for their personal costs. Thus plaintiffs may not recover their transportation and parking costs that they themselves incurred.

2. Lost Wages

Plaintiffs also claim compensation for the wages they lost taking leave to assist in the development and trial of this case. Ms. Sexcius missed several days of work on unpaid leave in order to prepare for court appearances, appear in court, confer with counsel and potential witnesses, and review and prepare court documents. (Sexcius Decl. (Application) at ¶1.) (Mr. Edmead appears to have taken time off work to make similar efforts to develop the case, but he has not submitted an affidavit stating that his work leave was unpaid.)

However, Congress has not authorized the courts to shift the expense of wages lost during the course of litigation. Lost wages are clearly not one of the elements of an "attorney's fee" shifted by § 1988. Elements of an attorney's fee must be, at a minimum, those costs that are incurred by the *attorneys* (or that easily could have been incurred by the attorneys, *see supra* (III)(B)(1)) and then billed to the clients. Plaintiffs' loss of wages, by contrast, is an out-of-pocket loss that has nothing to do with attorneys' billing practices. Nor are lost wages one of the costs Congress has shifted under § 1920 or

some other statute. Section 1920 makes no mention of lost wages in its list of taxable costs, and this court knows of no other statute that expressly shifts lost wages to the losing party.[29/]

Because Congress has not empowered this court to shift the burden of lost wages under § 1988, § 1920, or other statute, this court cannot award plaintiffs the wages they lost during litigation. This conclusion conflicts with this Circuit's 1984 ruling that § 1988 shifts lost wages,[30/] but it is faithful to the Supreme Court's 1991 ruling that unless an out-of-pocket expense is either a traditional element of a § 1988 "attorney's fee" award, or is expressly shifted by § 1920 or some other statute, federal courts lack power to shift the cost. In the present case, § 1988 and § 1920 "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further."[31/]

IV. CONCLUSION

For litigating the merits of *Sexcius* and for litigating this fee petition, plaintiffs are awarded fees in accordance with the chart below:

[29/]Of course, plaintiffs might have been able to claim the cost of their lost wages as part of their damages award. Plaintiffs did not do so in the present case.

[30/]*See Laffey*, 746 F.2d at 30 (holding that in enacting § 1988, Congress intended plaintiffs to recover wages lost during litigation). *See also Kyles v. Sec. of Agriculture*, 604 F. Supp. 426, 437 n.21 (D.D.C. 1985) (ruling that in an attorney's fee award, plaintiffs may recover "annual leave consumed . . . in connection with [their] claim."); *Laffey*, 572 F. Supp. at 386 n.73.

[31/]*West Virginia*, 111 S. Ct. at 1141.

Attorney	Hours	Prevailing Market Rate	Amount
Ms. Weiss			
-Original request	629.85	$260 per hour	$163,761.00
-Supplemental request	2.85	$260 per hour	$5,941.00
Ms. Barnett			
-Original request	249.35	$260 per hour	$64,831.00
-Supplemental request	9.85	$260 per hour	$2,561.00
Law Students	65.35	$80 per hour	$5,228.00
Total Fees for Merits and Fee Litigation			$242,322.00

For litigating the merits of *Sexcius* and for litigating this fee petition, plaintiffs are awarded costs in accordance with the chart below:

Type Costs Incurred by Counsel	Amount
-Deposition transcripts	$1,372.10
-Photocopying	$1,833.90[32/]
-Postage	$ 180.44
-Filing fee for complaint	$ 120.00
-Long distance telephone calls	$ 8.55
-Messenger service	$ 490.20
-Transportation and Parking	$ 108.50

[32/] In their application, plaintiffs requested this amount for photocopying and requested $180.44 for postage. Defendants in their opposition do not contest these amounts. In their reply brief, plaintiffs requested a higher amount for both photocopying and postage, without explanation or documentation. Only the lower, uncontested amounts will be awarded.

Costs Incurred by Plaintiff Sexcius	
-Photocopying	$1,167.14
-Postage	$ 60.00
Costs Incurred by Plaintiff Edmead	
-Photocopying	$ 967.14
-Postage	$ 26.95
Total Costs	$6,334.92

In sum, plaintiffs are awarded attorney's fees and costs as follows:

Total Fees for Merits and Litigation	$242,322.00
Costs	$ 6,334.92
(Less amount paid for contempt)	($ 847.05)
Total Fees and Costs	$247,809.87

Plaintiffs are hereby awarded $247,809.87 in attorney's fees and costs.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIEL SEXCIUS, *et al.*, Plaintiffs,	)	FILED December 13, 1993
v.	)	Civil Action No. 88-2104 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

ORDER

This matter comes before this court on plaintiffs' motion for an award of attorney's fees and costs under 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Award Act of 1976. Upon consideration of the record herein, it is hereby, for the reasons set forth in an accompanying memorandum opinion,

ORDERED that plaintiffs' motion for an award of attorney's fees and costs is granted, and it is further

ORDERED that defendants shall, within forty-five days of the date of this order, pay plaintiffs attorney's fees and costs in the amount of $247,809.87.

SO ORDERED.

/s/Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: December 13, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD GALLOWAY, Plaintiff,	)	FILED April 21, 1994
v.	)	Civil Action No. 91-0644 (JHG)
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OPINION AND ORDER

On March 16, 1993, the Court issued a Memorandum Opinion and Order entering judgment in favor of plaintiff and establishing a briefing schedule to determine the availability and amount of damages. At the conclusion of an evidentiary hearing held on July 26, 1993, the Court awarded plaintiff thirty thousand dollars in compensatory damages for the reasons stated orally at that hearing. Presently pending is plaintiff's motion for attorneys' fees and costs.

Both parties agree that fees are justified, that the hours expended by plaintiff's counsel are reasonable, and that the lodestar method of determining fees should be employed. The only issue remaining in dispute is the reasonableness of the hourly fees requested by plaintiff's counsel.

Plaintiff contends that the hourly rates set forth in the *Laffey* Matrix should be utilized to determine the rates of compensation for his various counsel. As an example, under this method, one of plaintiff's primary counsel, Vicki Golden ("Golden"), would receive $250 per hour for work completed

in 1992 and $260 per hour for work done in 1993. However, it appears that Golden has never earned that amount in her primarily employment discrimination private practice. She states that depending upon the circumstances, she charges anywhere from a contingent fee to $200 per hour.

In contrast to the rates requested by plaintiff, the District of Columbia maintains that the prevailing market rate for civil rights attorneys, not the rate for the broader District of Columbia Bar that the *Laffey* Matrix encompasses, must be utilized. The District contends that that rate for civil rights attorneys ranges from $135 per hour to $150 per hour. In support of this proposition, the defendant presents a sworn declaration listing the rates charged by seven District of Columbia civil rights attorneys.

Indisputably, Galloway is entitled to receive as attorneys' fees the prevailing market rate in the community. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984). The starting point in "prevailing market rate" analysis is often *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc) ("*SOCM*"). That case addressed the rates to be paid to private practice but public interest spirited attorneys. In overruling an earlier case awarding private practice attorneys only the reduced rate they had charged the particular client, the *SOCM* Court noted that Congress did not intend

> the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic.

Id. at 1524. Consequently, the prevailing market rate theory was held to apply to "attorneys practicing privately and for profit but at reduced rates reflecting non-economic goals." *Id.*

Because this case involves both attorneys who practice privately and for profit but who give reduced rates to many clients, and attorneys who practice in public interest legal services organizations, *SOCM* is particularly relevant. Taking Golden as an example is illustrative. Here, Golden contends that she left both her government position and then her large firm practice in order to practice employment discrimination law, which practice often involves unemployed clients. As a consequence of the type of work she now undertakes and the class of client she currently represents, she does not have any one average billing rate. Golden utilizes both contingent fee arrangements and differing hourly compensation, charging up to $200. Golden notes that had she stayed at Swidler & Berlin, an attorney of her experience would now be billed at a rate of $275 an hour. Thus, Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*. As such, although in other cases the attorney's "usual billing rate" may be of great assistance to the determination of the prevailing market rate, that is not the case here.

Although the Court is not completely satisfied by the *Laffey* Matrix,[1/] that Matrix has been frequently applied or approved by other courts and it continues to provide the most credible evidence available of rates for this market. *See, e.g., SOCM*,

---

[1/]The Court accepts as credible evidence the Matrix, but nonetheless would hope that a more complete breakdown and study of rates could be compiled for future use in attorneys' fees awards. The *Laffey* Matrix does not differentiate between an attorney with twelve years of experience and one with eighteen years. This Court concludes, as Judge Lamberth does that: "In future cases, this court hopes to base its calculations on statistically reliable, well-documented, and extensively surveyed evidence of the sort described above." *Covington v. District of Columbia*, No. 87-2658, slip op. at 14 (D.D.C. Dec. 17, 1993). Until that time, however, the *Laffey* Matrix will continue to provide credible evidence of prevailing market rates.

857 F.2d at 1525 ("[W]e commend [the use of the fee schedule complied by the district court in *Laffey*] for the year to which it applies. Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years."); *Trout v. Ball*, 705 F. Supp. 705, 709 n.10 (D.D.C. 1989) ("Although the updated [*Laffey*] matrix was never expressly approved by the court [in *SOCM*] because the parties settled the issue of fees, it does provide an accurate and updated schedule of attorney fees in this District."); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989) (taking judicial notice of *Laffey* Matrix rates); *Covington*, slip op., at 13 (applying *Laffey* Matrix); *Sexcius v. District of Columbia*, No. 88-2104, slip op., at 9-11 (D.D.C. Dec. 13, 1993) (applying *Laffey* Matrix); *Fischbach v. District of Columbia*, No. 87-0646, slip op., at 7 (D.D.C. Jan. 4, 1993) ("The Court accepts the *Laffey* matrix."). The figures provided by the defendant's declaration are significantly less persuasive. As the Court in *Covington* and *Sexcius* noted, seven examples of what civil rights attorneys charge -- "a small percentage of the District of Columbia's Bar" -- is insufficient to undercut plaintiff's reliance on the *Laffey* matrix.[2/] *See Sexcius*, slip op., at 5-8; *Covington*, slip op., at 7-8.

As a consequence, the Court will apply the rates provided on the *Laffey* Matrix to the attorneys in this case. The following is the breakdown of number of hours expended multiplied by the *Laffey* Matrix rate for each attorney or law clerk involved:

[2/] Because the defendant's evidence supporting its argument that the prevailing market rate for civil rights attorneys in the District of Columbia ranges from $135 to $150 per hour is so meager, the Court will not decide whether the prevailing market rates of a particular subpart of the District of Columbia Bar should be applied instead of the general rates provided in the *Laffey* Matrix.

Vicki G. Golden (18 years experience):

1992	99.70 hours x $250 =	$24,925.00
1993	72.10 hours x $260 =	18,746.00

Charles Cervantes (15 - 19 years experience)[3/]:

1992	2.00 hours x $250 =	500.00

David R. Cashdan (over 20 years experience):

1993	4.1 hours x $300 =	1,230.00

Lisa Sotir (1 - 2 years experience):

1992	2.60 hours x $125 =	325.00

Mary DeSales Linton (approximately 4 years experience):

1993	10.70 hours x $175 =	1,872.50

Timothy Cook (9 - 10 years experience):

1991	11.90 hours x $175[4/] =	2,082.50

[3/] Although the motion for attorneys fees states that Mr. Cervantes has 18 years of experience, the Golden Affidavit mentions only 15 years of experience. However, because the Laffey Matrix groups attorneys with 11 to 19 years of experience together, this discrepancy is immaterial to Mr. Cervantes' hourly fee.

[4/] Although Mr. Cook has 9 to 10 years of experience and could be billed at a rate of $215 per hour under the Laffey Matrix, plaintiff has only requested $175 per hour. The Court accepts that for reasons known to plaintiff, the lower rate is the more appropriate rate for Mr. Cook's services.

Joseph Russo (approximately 2 - 3 years experience):

1991-92[5/]	182.50 hours x $125	22,812.50
Law Clerks:		
1991	98.25[6/] hours x $75	7,368.75
Total Attorneys Fees:		$79,862.25

The defendant has not challenged the $2,242.95 in costs sought by plaintiff. Accordingly, it is hereby

ORDERED that plaintiff is awarded attorneys fees and costs in the amount of $81,105.20 (eighty-one thousand one hundred five dollars and twenty cents).[7/]

IT IS SO ORDERED.

April 21, 1994.

/s/Joyce Hens Green
JOYCE HENS GREEN

[5/]The vast majority of Mr. Russo's hours were expended in 1991 when the Laffey Matrix rate for an attorney of his experience was $125 per hour. That rate increased to $130 per hour in 1992. Because plaintiff has not requested that the $130/hour rate be applied for the 7.25 hours worked in 1992, the Court will not do so either.

[6/]Plaintiff's motion contains a typographical error: He lists a total of 99.25 law clerk hours instead of 98.25 hours (23 for Leigh Ann Griggers and 75.25 for Stephen Whiting).

[7/]This total amount encompasses the attorneys' fees and costs requested for all work accomplished in this case, including preparation of the reply memorandum submitted in support of the attorneys' fees request.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7014 **September Term, 1995**
USDC CV 87-2658

Darryl COVINGTON, et al.,
Appellees,

v.

Filed Sep 12 1995

DISTRICT OF COLUMBIA, et al.,
Appellants.

AND CONSOLIDATED CASES

BEFORE: Edwards, Chief Judge, Wald and Henderson, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 21, 1995, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7014

September Term, 1995
USDC CV 87-2658

Darryl COVINGTON, et al.,
Appellees,

v.

Filed Sep 12 1995

DISTRICT OF COLUMBIA, et al.,
Appellants.

AND CONSOLIDATED CASES

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc* that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams and Henderson would grant the suggestion.

Circuit Judge Tatel did not participate in this matter.

(3)

No. 95-910

Supreme Court, U.S.
FILED
JAN 17 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.
DARRYL COVINGTON, *et al.*,
and Consolidated cases,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

1) Whether this Court should disturb the district courts' factual findings as to the reasonable hourly rates for attorneys' fee awards when those courts relied upon extensive record evidence, including a regularly updated matrix of prevailing market hourly rates that is used by the U.S. Attorney's office and that was based on an extensive survey of hourly rates charged by attorneys in the District of Columbia who litigate complex federal cases?

2) Whether, under federal fee-shifting statutes, successful plaintiffs represented by public interest attorneys may recover attorneys' fees based on the market rates for attorneys of similar skill, experience, and reputation, or are they limited to recovering the below market hourly rates that they may occasionally be paid by their clients of limited means?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents request that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. INTRODUCTION

The cases before this Court involve attorneys' fee awards under federal fee-shifting statutes in three separate civil rights cases against the District of Columbia ("the District"). Consistent with *Blum v. Stenson,* 465 U.S. 886 (1984), the court in each case awarded attorneys' fees based on market hourly rates for attorneys of similar skill, experience, and reputation. Pursuant to *Save Our Cumberland Mountains v. Hodel,* 857 F.2d 1516 (D.C. Cir. 1988) (*in banc*) (*"SOCM"*), each court awarded plaintiffs hourly rates prevailing in the District of Columbia for attorneys of similar skill, experience, and reputation and held the public interest attorneys representing plaintiffs were not limited to the below market hourly rates they charge their impecunious clients.

Each district court found persuasive the plaintiffs' evidence of market rates. Plaintiffs submitted fee awards in recent similar cases in the District of Columbia, newspaper surveys providing rates charged by local law firms, and affidavits of attorneys of similar experience regarding rates charged fee-paying clients for similar work. The courts found particularly persuasive as evidence two matrices of prevailing community rates: one used by the U.S. Attorney's office, and one developed by the private bar. Use of such a matrix was approved post-*Blum* by the D.C. Circuit. *SOCM*, 857 F.2d at 1525. In these cases, neither plaintiffs nor the courts applied this matrix rigidly or as an "irrebuttable presumption"; in fact, some of the rates sought and awarded were below the matrix rates.

The courts below found unpersuasive the single affidavit submitted by the District. Neither the district courts

nor the D.C. Circuit shifted the burden of proof for establishing hourly rates to the District, but rather, found that plaintiffs met their burden and that the District's limited evidence was insufficient to rebut plaintiffs' extensive evidence.

The hourly rates used in the lodestar added no enhancement for contingency that would contravene *City of Burlington v. Dague*, 505 U.S. 557 (1992). Contrary to the District's assertions, and as demonstrated by the fee requests in *SOCM* and *Laffey v. Northwest Airlines, Inc.*,[1] public interest attorneys charged reduced rates to their impecunious clients and asserted that fact in support of market rate awards, years before *Dague* barred contingency enhancements; this practice is not an attempt to circumvent *Dague*.

The D.C. Circuit affirmed in all three cases the district courts' exercise of discretion in setting reasonable hourly rates based on prevailing market rates. App. 3. The Court also denied the District's Petition for Rehearing and Suggestion for Rehearing In Banc, with only Judge Henderson, who had dissented from the panel decision, and Judge Williams voting in favor of rehearing *in banc*. App. 82-84.

These awards are entirely consistent with decisions of this Court. As in *Blum*, attorneys with a practice that concentrates on representing clients who cannot afford to pay market rates, and on cases in which the plaintiff is a "private attorney general," are compensated based on the market value of their time, rather than on the modest amounts paid by clients of limited means. Consistent with *Dague*, the fee awarded is the reasonable number of hours worked multiplied by a reasonable hourly rate, with no enhancement for contingency.

There is no conflict among the Circuits, either on these questions or on the meaning of *Blum* or *Dague*. While

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[1] 572 F. Supp. 354 (D.D.C.), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

there has been some variation in different Circuits' applications of *Blum*, this variation arises from the unique facts and evidence of each case, not a Circuit conflict.

II. THE *LAFFEY* MATRIX

The *Laffey* matrix was adopted in an employment discrimination case, *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C.), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) and was cited with approval by the D.C. Circuit in *SOCM*, 857 F.2d at 1525. The matrix was based on a survey of lawyers at more than 20 law firms in the Washington, D.C. area, ranging in size from solo practitioners to large firms, and representing rates of more than 1400 attorneys of various seniority levels, including 80 specifically-named lawyers.

The *Laffey* court selected "prevailing market rates" for the matrix that were in the middle of the range of rates in the survey.[2] While the court awarded matrix rates to attorneys it found were well qualified and highly capable—as are the attorneys here—the court did not conclude that matrix rates apply only to exceptional attorneys. *Laffey*, 572 F. Supp. at 374-77. The inclusion of rates for inexperienced junior attorneys in the matrix demonstrates that it was not designed to "reflect rates paid to attorneys of extraordinary experience and expertise" as the District claims. Petition at 5.

The *Laffey* matrix has been relied upon regularly to determine prevailing market rates.[3] The private bar peri-

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[2] *Laffey*, 572 F. Supp. at 374-75. For example, the 1983 rates for "very experienced court litigators (*e.g.*, 20 or more years of experience)" ranged from $150 to $250 per hour. The $175 *Laffey* matrix rate selected for "very experienced federal court litigators" was lower than most survey rates for that experience level. The same pattern holds true for other matrix rates, demonstrating the *Laffey* matrix did not reflect solely or even primarily "premium" rates charged by so-called "luminaries of the bar."

[3] *See, e.g., Park v. Howard University*, 881 F. Supp. 653 (D.D.C. 1995), *vacated on other grounds*, —— F.3d ——, 1995 WL 738946

odically updates the matrix and in the early 1990s, the U.S. Attorney's Office developed its own matrix, based upon *Laffey* market rate information, but updated annually using the Consumer Price Index.

Laffey matrix rates are prevailing market rates, not "premium" rates. A comparison with attorneys' fees awarded in Independent Counsel cases shows that some rates awarded in those cases were much higher than the matrix rates.[4] *The National Law Journal* article referred

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(D.C. Cir. Dec. 15, 1995); *Cook v. Billington*, No. 82-0400 (Sept. 22, 1995) (approval of class-action settlement agreement with rates based on U.S. Attorney's matrix), *appeal pending on other issues; Shepherd v. ABC*, 862 F. Supp. 505 (D.D.C. 1994), *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995); *Brown v. Pro-Football, Inc.*, 846 F. Supp. 108, 116 (D.D.C. 1994), *reversed on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, —— U.S. ——, 1995 WL 555467, 64 U.S.L.W. 3410, 64 U.S.L.W. 3414 (Dec. 8, 1995); *Drummond v. Howard Univ.*, No. 91-CA-9446 (D.C. Super. Ct. Dec. 8, 1994); *Hartman v. Catto*, No. 77-2019 (Special Master's Report) (D.D.C. February 18, 1994 at 11); *Hodge v. Kemp*, No. 92-1183 (SS) (D.D.C. May 4, 1993) (approving settlement reflecting rates as set forth in 1992 U.S. Attorney's Office matrix); *Fischbach v. District of Columbia*, C.A. No. 87-0646, 1993 U.S. Dist. LEXIS 19756 (D.D.C. Jan. 4, 1993), *appeal dismissed*, 1994 U.S. App. LEXIS 19231 (D.C. Cir. 1994); *Robles v. United States*, C.A. No. 84-3685, 1992 U.S. Dist. LEXIS 142 (D.D.C. Jan. 10, 1992); *Estate of Willis Brown v. District of Columbia*, No. 6052-87 (D.C. Super. Ct. March 22, 1991) (awarding rates consistent with *Laffey* matrix); *Kidd v. District of Columbia*, No. 89-92695 (D.C. Super. Ct. Feb. 12, 1991) (adopting matrix rates); *Hatfield v. Garrett*, EEOC Decision (Sept. 26, 1990); *Trout v. Ball*, 705 F. Supp. 705, 709, n.10 (D.D.C. 1989); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984); *Palmer v. Schultz*, 594 F. Supp. 433 (D.D.C. 1984); *Thompson v. Sawyer*, 586 F. Supp. 635, 641 (D.D.C. 1984); *Planells v. Howard Univ.*, 34 F.E.P. Cas. 66, 69 (D.D.C. 1984).

[4] *See In re North (Regan Fee Application)*, —— F.3d ——, 1995 U.S. App. LEXIS 36364 (D.C. Cir. Dec. 22, 1995) (awarding, *inter alia*, rates of $400 and $385 to attorney with 26-28 years of experience, rate of $235 and $250 for attorney with 4-6 years, and $205 for attorney with 1-3 years); *In re North (Bush Fee Application)*,

to by the District, Petition at n.3, also shows a higher top rate ($400), and for an *earlier* year (1990). The 1992-93 matrix rates for partners ($225-$300) fall well within, and not at the top of the range of $205-$400 in the 1990 survey of *The National Law Journal*. J.A.(I) 117. Furthermore, use of the matrix by the U.S. Attorney's office "to determine whether hourly rates sought by attorneys in cases involving fee shifting statutes are reasonable," J.A.(II)87, suggests that matrix rates are typical, rather than "premium" rates.

The fact that the *Laffey* matrix is structured so that a single rate is assigned to a range of seniority levels (e.g., 11-19 years), rather than having a different rate for each year of experience does not invalidate the matrix or make it impermissible as evidence. Courts may depart from the matrix when an attorney's seniority, performance, or credentials suggest a higher or lower rate.

III. THE DISTRICT COURT DECISIONS

A. Their Common Threads

The fee awards here were not based solely on the matrices. Each district court considered the detailed declarations of plaintiffs' counsel attesting to the public interest nature of their law practices, and to their custom of taking cases involving significant issues of public interest and of charging no fee at all or only the limited amount clients could pay. Each court also examined extensive market rate information, including newspaper surveys of rates actually charged by various law firms, other awards of fees to similarly experienced lawyers handling federal litigation in the District of Columbia and one or more *Laffey* matrix. J.A.(I)14; J.A.(II)16 n.12; J.A.

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59 F.3d 184 (D.C. Cir. 1995) (awarding $375 per hour for most senior attorney); *In re North (Schultz Fee Application)*, 8 F.3d 847 (D.C. Cir. 1993) (calling $370 per hour for most senior attorney and $310 for another partner "well within the range charged by lawyers in the District of Columbia").

(III)16-17. Moreover, *Sexcius* and *Covington* were simultaneously decided by Judge Lamberth, who had the evidence in each case before him when he decided the other. J.A.(II)17.

In each case, the District submitted a single affidavit reciting isolated rates charged by a few solo or small-firm plaintiffs' lawyers. These included rates charged *six years prior* to the fee awards in these cases (Adler and Bennett 1987 rates), J.A.(I)218-19. The District's affidavit included rates for one firm substantially in excess of the District's proposed submarket, J.A.(I)222.

Based upon reviews of all these materials, observation of counsel's performance, and their extensive familiarity with rates charged by and awarded to local attorneys with similar experience and competence, each court found that these counsel charged below-market rates, and that counsel did so for non-economic, public service reasons. Consistent with *Blum* and *SOCM*, the courts awarded rates generally consistent with rates on the matrices.

Contrary to the District's assertions, the district courts did not apply the matrix slavishly and rigidly. No court indicated it was *required* to award matrix rates, and the courts actually awarded some lower-than-matrix rates. Each court found ample evidence to support the rates awarded, and found the District's limited rebuttal evidence insufficient to overcome the reasonableness of the rates established by plaintiffs' extensive evidence.

B. *Covington* [5]

Plaintiffs in *Covington* are ten inmates of a District of Columba prison who were beaten by correctional officers while handcuffed. They sued the District under 42 U.S.C. § 1983. The jury awarded damages of $774,505. The parties settled while the District's appeal was pending.

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[5] Respondents limit their presentation to lead counsel in each of these cases. Respondents note, however, that rates lower than the matrix rates were requested and awarded for additional attorneys. App. 6-8.

The settlement provided entitlement to a fee award, but the parties did not agree on hourly rates.

Plaintiffs' fee application included detailed information about counsels' skill, experience, and reputation,[6] their reduced rate billing practice, and prevailing market rates for similar services by comparable lawyers. Plaintiffs' lead counsel, Gaffney & Schember, P.C., is a two-attorney firm, with a practice that includes federal court litigation concerning civil rights and civil liberties, military law, and employment law, on behalf of persons of modest means or public interest organizations. J.A.(I)159-160. The firm handles cases on a fee award or contingent fee basis, on a reduced hourly rate basis, and on a *pro bono* basis. J.A.(I)160. Most fees come from fee award or contingent fee cases. *Id.*

Messrs. Schember and Gaffney quoted prospective clients a below-market hourly rate ($125 per hour from 1986 to mid-1990 and $150 per hour from mid-1990 to the present), J.A.(I)164 & 170-171, but often charged less or nothing at all, depending on the client's ability to pay and the significance of the issues. J.A.(I)164 & 170-171. Rather than showing, as the District suggests, that "they have responded to market conditions by charging rates below those charged by large firms and by maintaining fairly constant rates over the years," Petition at 9-10, these declarations show they set rates without regard to market rates, opting instead to charge rates that would permit low income clients to bring cases of public significance. The rates charged were not "the rates they can command in the market."

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[6] Schember and Gaffney worked at the Lawyers' Committee for Civil Rights Under Law after graduating from law school in 1974 and 1975, respectively, and went into private practice in late 1977. J.A. (I) 150 & 159. Mr. Schember was an Adjunct Professor of Law at Antioch School of Law. Counsel submitted detailed declarations highlighting their firm's and their own significant achievements, awards, and their cases and victories involving civil rights and liberties. J.A. (I) 150-176; J.A. (I) 150-154, 160-162.

Plaintiffs' extensive evidence of rates charged by similar counsel in comparable cases included:

- The original *Laffey* fee matrix (1983) with an affidavit (Oct. 26, 1984), by Daniel A. Reznek, fee counsel in *Laffey*. J.A.(I)39-53.
- A second Reznek affidavit (July 29, 1987) in a civil liberties case, *Hobson v. Brennan*, Civil Action No. 76-1326 (LFO) (attesting to increases in market rates since original *Laffey* matrix.) J.A. (I)54-62.
- A third Reznek affidavit (Aug. 4, 1988) used in *In Re: Donovan* (attesting to further increases in market rates.) J.A.(I)73-77.
- The post-*SOCM Laffey* matrix from a declaration by Joseph A. Yablonski (March 2, 1989), *SOCM* counsel (used in *Broderick* v. *Ruder*, Civil Action No. 86-1834, an employment discrimination case, indicating fees in *SOCM* were "finally settled, at rates extremely close to those reflected on the matrix, with Government agreeing [to] rates of $245 to $255 per hour.") J.A.(I)84-89.
- The decision in *Hatfield v. Garrett*, No. 01892909 (EEOC, Dec. 12, 1989) (discrimination case awarding market rates under *SOCM* using updated *Laffey* matrix. J.A.(I)90-105.
- A declaration from Joseph M. Sellers (Feb. 21, 1990), an experienced civil rights litigator with the Washington Lawyers Committee for Civil Rights Under Law attesting that updated *Laffey* matrix "fairly reflects the prevailing rates in the District of Columbia for lawyers engaged in complex federal litigation such as the trial of civil rights claims." J.A.(I)106-111.
- The U.S. Attorney's version of the updated *Laffey* matrix filed by the government in *Lewis v. Brady*, Civil Action No. 92-0898 (TFH), a discrimination case. J.A.(I)112.

- A Memorandum Opinion in *Robles v. United States*, Civil Action No. 84-3685 (TAF) (Jan. 10, 1992), an employment discrimination case awarding under *SOCM* using the *Laffey* matrix. $250 per hour for 1991-92. J.A.(I)119-140.
- A fourth Reznek affidavit (Feb. 24, 1992) used in a civil rights case, *Parker v. District of Columbia*, Civil Action No. 83-3382 (JHG) (attesting to rate increases and indicating 1992 rates for senior lawyers in *Parker*, $250 and $265, "are consistent with or lower than the prevailing hourly rates charged by other lawyers of comparable skill and experience in the District of Columbia." J.A.(I) 78-83.
- The U.S. Attorney's Office matrix from the Stipulation of Settlement in *Hodge v. Kemp*, Civil Action No. 92-1183 (SS), an employment discrimination case. J.A.(I)298-301.
- A Memorandum Opinion (Jan. 4, 1993) in *Fischbach v. District of Columbia*, Civil Action No. 87-0646 (JGP), an employment discrimination case, awarding fees under *SOCM* using *Laffey* matrix. ($240 and $265 per hour). J.A.(I)254-262.
- Hourly rate information for lawyers at twelve local law firms for 1989, 1990, and 1991 (*Legal Times*, Dec. 9, 1991). J.A.(I)184.

The District's response was a declaration from its own attorney, Michael E. Zielinski, J.A.(I)217-227. The declaration acknowledged that "[s]ome large firms have . . . been involved in civil rights cases against the District" and that such large firms "do request fees . . . at their normal billing rates that are typical of the premium rates listed in the Laffey matrix." J.A.(I)224-225. The declaration was silent about the rates the District has paid large firms that prevail against it in civil rights cases, but showed no similar restraint in discussing fees paid nine solo practitioners or small firms who sued the District in civil rights cases and charged only about $150 per hour.

J.A.(I)220-225. Based on these few examples, the District asserted the relevant market was a sub-market of plaintiff's attorneys who handle civil rights cases and employment discrimination cases rather than the market for complex federal litigation, and that the rate for this sub-market was only $150 per hour for attorneys with between 10-20 years of experience rather than the higher prevailing market rates for complex federal litigation.

Notwithstanding the District's assertion that none of these cases was complex, the court found that "[p]laintiffs' counsel handled very well this *complicated federal case* which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial." J.A.(I)7 (emphasis added).

The court found that "defendants have not challenged plaintiffs' declarations showing that Gaffney & Schember, P.C. has a history of handling civil rights and civil liberties cases either without charge or at 'below-market rates' for non-economic reasons" and that "defendants have failed to disprove" that plaintiffs' counsel "charge some of their poorer clients reduced rates out of public interest motives." J.A.(I)10.[7] He found as a fact that plaintiffs' counsel were "public interest but private practice lawyers" and, citing *SOCM*, held they were "entitled to receive prevailing market rates for their services." *Id.*

The court found plaintiffs "have presented sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters," J.A.(I)13-14. It held "plaintiffs have met their evidentiary burden," and awarded Schember and Gaffney, each with over 18 years of experience, $260 per hour. J.A.(I)18.

Judge Lamberth held that the District had not established a valid sub-market consisting only of plaintiffs' lawyers in civil rights and employment cases, or that the prevailing rates for the proposed sub-market were lower

[7] The District conceded that lead counsel "discount[ed] or reduc[ed]" their rates "with some regularity." Defendants' Opposition to Plaintiffs' Motion for Fees at 8 (January 29, 1993).

than the rates prevailing in the broader market for complex federal litigation. J.A.(I)13. Regarding the District's evidence, Judge Lamberth said:

> These seven examples look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market.

J.A.(I)15-16. Judge Lamberth observed that "[d]efendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market." J.A.(I)16. Overall, the court found that "defendants' factual rebuttal of plaintiffs' evidence [on rates] has been ineffectual." J.A.(I)18.

C. Sexcius

Plaintiffs Sheriel Sexcius and William Edmead, two school teachers, signed a petition opposing certain educational practices. The District took action to remove them from their teaching jobs, and they sued under 42 U.S.C. § 1983. The Court granted judgment in their favor and a permanent injunction forbidding defendants from infringing on plaintiffs' constitutional rights. The District appealed, but withdrew the appeal.

Plaintiffs' fee application cited three recent local attorneys' fee decisions approving hourly market rates based upon the U.S. Attorney's Office *Laffey* matrix. J.A.(II) 35. Plaintiffs also submitted the original *Laffey* matrix and an explanatory Affidavit (J.A.(I)84), a U.S. Attorney's Office *Laffey* matrix (J.A.(II)40-41), the fee decision in *Fischbach v. District of Columbia* (J.A.(I)254), and declarations by plaintiffs' counsel describing their public interest practice skills, experience, and accomplishments. J.A.(II)41-56.[8]

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[8] Before becoming an Administrative Law Judge in 1991, Edith Barnett practiced labor and employment law for approximately 21

The District opposed the hourly rates sought by raising the same issues raised in *Covington*, and by again filing Mr. Zielinski's *Covington* affidavit. J.A.(II)57-67. The District contended that Judge Barnett and Ms. Weiss were limited to a rate of $100 per hour, the reduced rate their school-teacher clients paid.[9]

Judge Lamberth made specific factual findings that Weiss and Barnett met the *SOCM* criteria for public interest practice, and awarded fees based on the prevailing market rate. J.A.(II)10-11. J.A.II(18-19).[10] He determined that $260 per hour for Ms. Weiss (18 years of experience) and Ms. Barnett (21 years of experience) were "reasonable" market rates.[11]

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years. J.A. (II) 48-56. Judge Barnett served as a litigator and supervisory attorney with the Solicitor's Office of the U.S. Department of Labor from 1971 through 1981. In 1981 she became Associate General Counsel to the American Federation of State, County & Municipal Employees and, thereafter, went into private practice. Lead counsel Weiss had practiced labor and employment law for approximately 18 years. Weiss is a veteran of the Solicitor's Office, U.S. Department of Labor, the General Counsel's Office of the EEOC, and has extensive experience in private practice as a labor and employment specialist. Both attorneys in *Sexcius*, like the attorneys in *Laffey*, litigated landmark employment cases. J.A. (II) 41-56. Both are recognized experts in labor law and employment discrimination law, have lectured, published and held leadership positions in bar associations in these specialties, and have served as federal court mediators in employment and labor cases.

[9] In response, plaintiff submitted an EEOC attorneys' fee decision (J.A. (I) (90), the Affidavit of David R. Cashdan from *Galloway* (J.A. (II) 83-84), and a Declaration by Assistant U.S. Attorney James R. Layton stating that the D.C. U.S. Attorney's Office "regularly use[s] the attached matrix to determine whether hourly rates sought by attorneys in cases involving fee-shifting statutes are reasonable." J.A. (II) 87.

[10] The district court's holding was proper under this Court's decision in *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (fee agreement does not impose ceiling on fee award).

[11] These were the rates requested by plaintiffs. If the litigants had automatically sought *Laffey* rates, the rate for Ms. Barnett would have been higher—$285.

D. *Galloway*

This case of first impression under the Americans with Disabilities Act was brought by Donald Galloway, who was excluded from jury service because of his blindness. The district court awarded injunctive relief and damages. The District did not appeal.

Mr. Galloway's fee motion relied principally on three attorneys' fee decisions relying on the *Laffey* matrix. J.A.(III)25. Mr. Galloway also offered the Sellers Affidavit in support of the Matrix.[12] Lead counsel Vicki Golden's affidavit set out her extensive experience in complex federal litigation, including ten years at the Department of Justice and two years in a large firm. J.A.(III) 28-32. Mr. Galloway also submitted the Layton Affidavit with the U.S. Attorney's Office matrix, and a second Affidavit identifying the established billing rate Ms. Golden's former law firm now charges for lawyers with her experience, and suggesting use of this rate. J.A.(III) 41-52. In opposing the rates requested, the District submitted the same affidavit and proposed the same "mini-market" as in *Covington*. J.A.(III) 16 n.5.

Judge Green relied on *SOCM* and awarded Ms. Golden and other attorneys market rates. She noted that Ms. Golden left a more lucrative practice to represent less wealthy clients, and that she does not have an established billing rate. J.A.(III)14. The court found that "Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*." *Id.* It found that the *Laffey* matrix "is the most credible evidence of rates for this market." J.A.(III)15 & n.1. Judge Green found the

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[12] Sellers described the matrix's history and attested that, based on Mr. Sellers' experience in litigating over fifty claims of discrimination in the Washington area, matrix rates "fairly reflect the prevailing rates in the District of Columbia for lawyers engaged in complex federal litgation, such as litigation of civil rights claims." J.A.(III)37-40.

reasonable market rate for Ms. Golden, (18 years of experience), to be $250 in 1992 and $260 in 1993.

IV. THE COURT OF APPEALS' DECISION

The Court of Appeals affirmed all findings of fact concerning reasonable hourly rates and correctly held that each case "involves a relatively straightforward application" of principles established in *Blum* and *SOCM*. App. 11. The Court of Appeals held that each district court made specific factual findings either that plaintiffs' counsel had no established billing rates or that, although they charged some clients on an hourly basis, the rates charged were reduced for public spirited, non-economic reasons. The Court determined these findings were supported by the evidence, and there was ample evidentiary support for each court's findings as to the prevailing "market rate." App. 17-21. The Court noted that the *Laffey* matrix is a "useful starting point," and listed other evidence that can supplement the matrix. App. 16.

Nothing in these decisions either requires that *Laffey* rates be awarded in *all* cases where the practitioner charged less than the *Laffey* matrix, or makes evidence of actual rates irrelevant. Likewise, the decision did not place the burden of proof on defendant and does not make the *Laffey* rates an irrebuttable presumption. Rather, matrix rates only apply to counsel who prove they meet the three *SOCM* requirements *and* prove that his or her skills, reputation, and experience are similar to those of other practitioners of similar quality and experience who command such rates in similar matters. Based on the evidence before them and their own experience, district courts can award *Laffey* rates or depart from them, either to reflect counsel's normal market-based billing rate or to reflect counsel's higher or lower competence.

REASONS FOR DENYING THE WRIT

Stripped of all its cert-seeking rhetoric, the District's petition merely attempts to reverse a decision affirming the exercise of district court discretion in three cases

involving factual determinations about appropriate attorney hourly rates. In enacting these fee-shifting statutes, Congress recognized the rights at stake are vitally important and that without fee-shifting, citizens whose rights were violated typically could not afford to hire attorneys. Following *Blum*, the D.C. Circuit permits certain prevailing plaintiffs to recover rates their public interest attorneys could command in the market, rather than below market rates charged clients of modest means. The Court of Appeals properly placed the burden on plaintiffs to prove the rates charged to clients who can pay some fee are below market rates for attorneys of similar skills, experience, and reputation who handle comparable matters. The judge in each case found plaintiffs met this burden, and the Court of Appeals found sufficient evidence to support these findings. The lower courts' reliance, in part, on the matrix does not create a rule "legislative in nature" mandating the automatic application of matrix rates in every fee-shifting case.

Review by this Court is not necessary because the decisions below are entirely consistent with *Blum* and *Dague*. Each decision calculates a lodestar using prevailing market rates, which *Blum* holds are necessary to attract competent counsel and do not produce a windfall, and which *Dague* holds results in a fully compensable fee. None of the cases awards a contingency enhancement in addition to the lodestar. There is no conflict between the circuits regarding whether privately practicing but public interest counsel can be awarded a market rate higher than reduced rates charged clients. To the extent that decisions on hourly rates in the various circuits appear to take different approaches, such appearance arises from factual differences in the cases, rather than disagreement on the interpretation of *Blum* or *Dague*.

I. THE DECISION OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT

A. This Court's Decision in *Blum v. Stenson*

The District asserts that the Court of Appeals' decision conflicts with *Blum* because: (1) fees were awarded based on prevailing market rates rather than counsel's below-market rates; (2) the market rates used were for complex federal litigation rather than a mini-market of plaintiffs' civil rights attorneys from solo or small firm practices; (3) the *Laffey* matrices were used to create an irrebuttable presumption and cannot be used to help determine prevailing market rates; and (4) the Circuit opinion affirmed decisions that erroneously placed the burden of proof on defendants. No such conflicts with *Blum* exist, as we demonstrate below.

In *Blum* this Court considered the argument that "the use of prevailing market rates to calculate attorney's fees under § 1988 leads to exorbitant fee awards and provides windfalls to civil rights counsel contrary to the express intent of Congress." *Blum*, 465 U.S. at 892. The defendant wanted fee awards under § 1988 to be based on the cost of providing legal services rather than prevailing market rates. *Id.* This Court rejected both defendant's proposed cost-based approach and the Solicitor General's amicus argument (that the rate for nonprofit legal aid attorneys should be calculated differently from the rate for attorneys in for-profit private practice) in favor of the prevailing market approach. *Id.* at 892-95. The Court was guided by the legislative history of § 1988.[13] It concluded that "reasonable fees under § 1988 are to

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[13] *See* S. Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913 (citing, *inter alia*, *Davis v. County of Los Angeles*, 8 EPD ¶ 9444 (C.D. Cal. 1974) (awarding prevailing market rate and holding that "[i]n determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded nonprofit public interest law firm").

be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel," *Blum*, 465 U.S. at 895, and that the evidence of prevailing market rates should show: "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895, n.11.

Awarding the *market* rate, by definition compensates counsel appropriately without a windfall.[14] Awarding market rates also avoids unfairness that occurs by awarding the lawyer with superior skills, experience and reputation in a small-firm public interest practice, a lower rate than a less qualified or experienced lawyer, perhaps at a larger firm, who typically represents clients that can pay market rates.[15] The District challenges the district court findings and argues the Circuit decision always requires an award of *Laffey* rates. This concern is not borne out by experience since the 1988 *SOCM* decision. District courts have demonstrated the ability to determine when plaintiffs have met their burden to show reduced rates for non-economic reasons, and have not hesitated to deny higher rates when that burden was not met.[16]

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[14] *Missouri v. Jenkins*, 491 U.S. 274, 287 (1989) ("[i]f the fees are consistent with market rate and practices, the "windfall" argument has no more force with regard to paralegals than it does for associates"); *Blanchard*, 489 U.S. at 93-96 (rejecting argument there would be a "windfall" if fee recovery exceeded amount in contingent fee agreement, permitting plaintiff to recover lodestar fees based on "reasonable worth of services rendered," and stating that "[s]hould a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount"); *Blum*, 465 U.S. at 895.

[15] *See Bankston v. Illinois*, 60 F.3d 1249, 1256 (7th Cir. 1995) (holding: "[t]he district court may not reduce the established rate by some factor that it believes accounts for differences between large firms and small firms. Lawyers of common expertise and experience in the same market are entitled to the same rate").

[16] *See Goos*, 997 F.2d 1565, 1568-69 (1993) (affirming that plaintiff could recover only rate counsel normally charged ($130-$140),

The concept of basing "prevailing market rates" on rates charged in a narrow submarket [17] of a few plaintiffs' attorneys in a specific substantive area is contrary to Congressional intent in enacting the fee-shifting statutes, contrary to law, unworkable in civil rights and civil liberties cases, and was found by the district courts to be factually unsupported. To attract competent counsel, Congress intended prevailing plaintiffs under § 1988 to be compensated at the same rates as attorneys in other complex federal litigation. S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913, stating:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and may not be reduced because the rights involved may be non-pecuniary. . . .

Accord, H. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976). This Court's precedent does not require that attorneys' fees for civil rights and civil liberties cases be based on a "mini-market." [18]

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not rate "found in the schedule (or matrix) of prevailing community rates adopted in this circuit" (220-240), when "there [was] nothing in the record . . . to suggest that Ms. Goos' attorney offered her a discounted rate for altruistic reasons").

[17] This Court's normal policy is that issues not pressed and ruled on by the Court of Appeals are not properly presented for review. *Duignan v. United States*, 274 U.S. 195, 200 (1927). The District failed to press its sub-market argument in the Court of Appeals. App. 20. Consequently, the Court of Appeals did not fully discuss this issue. The District should not be permitted to resurrect it here. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957) (Court would not address question Court of Appeals held party waived).

[18] *See Blanchard*, 489 U.S. at 95 ("it is clear that Congress intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation"); *Blum*, 465 U.S. at 893 (looking to fee awards in antitrust case and case involving constitutional challenge to state statute to determine market rates in Medicaid case).

The applicable statutes entitle prevailing plaintiffs to a "reasonable attorneys' fee," which is a rate within the range of rates charged in the market for "similar work." *Jenkins*, 491 U.S. at 283; *Blum*, 465 U.S. at 895. Any "market rate" requires a purchaser willing and able to pay for the service. Indigents, or even individuals of moderate means, are typically unable to pay the actual lodestar attorneys' fees involved in a typical civil rights lawsuit, but can pay, if anything, only reduced rates or a lump sum. Under those circumstances, there are no "mini-market rates," and this Court has recognized that, in the absence of fee-shifting statutes, a "market" for the work of civil rights plaintiffs' lawyers "scarcely exists." [19]

The District failed to prove a sub-market exists, or to rebut plaintiffs' evidence of market rates for complex federal litigation. The evidence for the District's proposed mini-market was limited to solo or small firm lawyers representing plaintiffs against the District of Columbia, who have rates significantly below prevailing market rates.[20] J.A.(I)218-231. The district courts considered the District's limited evidence and found it unpersuasive.

The District asserts that prevailing market rates cannot be determined with a fee matrix. Contrary to this assertion, the 1993 Advisory Committee Notes to Rule 54(d) (Costs; Attorneys' Fees) of the Federal Rules of Civil Procedure expressly permit courts to "consider

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[19] *Dague*, 505 U.S. 564. *See City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (explaining that "Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process . . . These victims ordinarily cannot afford to purchase legal services at the rates set by the private market").

[20] Even though the District acknowledged it had paid matrix rates in civil rights cases, it omitted those firms or rates in its proposed sub-market. The record indicates the District paid a rate of $340 to a Covington & Burling attorney whose client prevailed in a civil rights case against the District. J.A.(II)85.

establishing a schedule reflecting customary fees or factors affecting fees within the community." Moreover, although the District takes the position here that use of the matrix is not permitted, the District has itself used the *Laffey* matrix as evidence of market rates.[21]

Blum's recommendations regarding how to determine a "reasonable rate," do not preclude use of the *Laffey* matrix. Here, the matrices were used properly—as evidence of the prevailing market rate—not as an irrebuttable presumption; no court below suggested the matrix was mandatory. Criticisms of the structure or validity of the matrix go to the weight of the matrix, not to its use as evidence. In these cases, however, the affidavits describing updates of the matrix, and numerous specific rates in the record demonstrate the matrix "provide[s] credible evidence" of prevailing market rates, not premium rates that apply only to attorneys of "exceptional skill and experience" as the District contends.[22]

The District's contention that lawyers use the *Laffey* matrix as a floor, and always seek matrix rates is not borne out by the experience here; in both *Sexcius* and *Covington*, plaintiffs requested rates below the *Laffey* matrix for certain timekeepers. Moreover, district courts have demonstrated that they will not award matrix rates to attorneys they believe could not command such rates in the market.[23]

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[21] *See District of Columbia ex rel. Payton v. Basiliko, et al.*, No. 91-2518 (D.D.C.) (Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees at ¶ 9, (District submitted U.S. Attorney office matrix to support its fee request).

[22] J.A.(III)15. Plaintiffs submitted affidavits from Daniel Reznek, the attorney who formulated the original *Laffey* matrix, and from Joseph Yablonski, the lead attorney in *SOCM*, stating the original *Laffey* matrix and subsequent updates are conservative and reflect lower rates than those prevailing in the community. J.A.(I)55; J.A.(I)84-88. The original *Laffey* matrix rates were lower than many rates in the *Laffey* survey.

[23] As the District itself points out, Petition at 6, the *Laffey* court did not award matrix rates to an attorney who lacked sufficient experience. *Laffey*, 572 F. Supp. at 375, n.37.

In all of these cases, plaintiffs submitted detailed affidavits that provided ample information for the courts to find that counsels' practices were based on representing "worthy but not wealthy clients," and that the rates charged clients who could pay something were reduced because of the clients' limited ability to pay, rather than the skill, experience, and reputation of counsel. The record amply demonstrates that lead counsel in each case were highly skilled, very experienced and accomplished, and had won significant victories in these cases. J.A.(I)6-9, 150-176; J.A.(II)33 & 47, 56; J.A.(III)28-32. The courts assessed various counsels' experience, performance, and accomplishments as well as the evidence submitted by both sides and concluded "plaintiffs have shown that their counsel charge below-market rates out of public-spirited motives." J.A.(II)11. Therefore plaintiffs "were entitled to recover the prevailing market rate for their counsels' services." *Id.*; J.A.(III)14; J.A.(I)11. This finding was well supported by the record in each case.

Judge Lamberth and Judge Green applied their own considerable knowledge of attorney rates based on experience as judges and, previously, as practicing lawyers.[24] Each court awarded rates that the evidence indicated were well within the range of market rates for D.C. attorneys with similar skills, experience, and reputation doing comparable work on similarly complex federal cases.

B. This Court's Decision in *City of Burlington v. Dague*

The District suggests the fees awarded are inconsistent with *City of Burlington v. Dague*, 505 U.S. 557 (1992). because they contain a hidden contingency enhancement.

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[24] Judge Lamberth headed the civil division of the U.S. Attorney's office in D.C. for more than a decade. In that capacity, he reviewed, litigated, and settled dozens of fee petitions, and as such was very familiar with hourly market rates. As a judge, Lamberth has considered fee petitions in at least 8 reported cases. Judge Green was in private practice for 17 years before becoming a judge in 1968, and has at least 3 reported attorneys' fee decisions.

The District also argues that across-the-board enhancements may not be used in setting a reasonable fee and that *Dague* therefore bars fee awards based upon the five experience groupings in the *Laffey* matrices. Petition at 22. Contrary to these strained arguments, no decision below awarded a "hidden contingency enhancement," granted "across-the-board enhancements," or selected rates *solely* based on an "experience group." The district courts awarded only market rates equal to the hourly value of counsels' services based on their assessment of each counsel's skill, experience, and reputation.

This Court held in *Dague* that the risk of non-recovery is not a basis for an upward enhancement of the lodestar. *Dague,* 505 U.S. at 562-67. The "market-based" hourly rates counsel received here did not "enhance" the lodestar, but were used to derive the lodestar, which is the "hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 465 U.S. at 888. Awarding market rates in the lodestar ensures that it accurately reflects the experience, ability, and reputation of counsel.

Awarding market rates higher than the reduced rates clients can afford to pay is not an impermissible enhancement, but is fully consistent with *Dague. Dague* rejected a contingency enhancement *in addition to the lodestar fee.* Using market rates in the lodestar is entirely consistent with *Dague*, and is not a "contingency enhancement." [25] *Dague*, 505 U.S. at 562-63.

Similarly, using the *Laffey* matrix as evidence of the market rate does not create a class-based enhancement. Each court retains the authority and responsibility to assess counsel's skill, experience, and reputation, and the rate the attorney could command in the market. A court may determine that counsel can command rates consistent with the matrix, or that counsel should be awarded a higher or a lower rate. Likewise, the court may consider

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[25] Moreover, as noted *supra*, *SOCM*'s reduced rate theory *preceded* the bar on contingency enhancements and was not constructed to circumvent *Dague*.

other evidence of the market rate, and may choose to rely on this evidence instead of or in addition to the matrix. Because the matrix is neither mandatory nor presumptive, use of the matrix as evidence does not establish class-wide rates for all attorneys of each experience level.

The District also cites *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992), to support its "disguised multiplier" argument. *Barrow* has no relevance here. In *Barrow*, plaintiff's counsel had a market rate he normally charged his commercial clients. Id. at 1105. He neither contended nor submitted evidence that he reduced his rate to support the case of a worthy client who could not afford higher rates. *Barrow*, 977 F.2d at 1106. The plaintiff in *Barrow* sought to recover a rate in excess of his counsel's market rate. Here plaintiffs seek only market rates for their counsel. That is exactly what the district courts awarded, no more, no less.

II. THERE IS NO INTER-CIRCUIT OR INTRA-CIRCUIT CONFLICT

The District attempts to create a conflict in the circuits, where none in fact exists. Although the various circuits have issued dozens of decisions involving hourly rates under fee-shifting statutes, the differences occasionally reflected are a function of the facts of the particular case and the evidence concerning reasonable rates. All those decisions used the same method to determine lodestar fees, i.e., a reasonable rate times a reasonable number of hours. To determine the reasonable hourly rate, courts have considered the skill, experience, and reputation of the attorney involved compared to what attorneys of similar skill, experience, and reputation are paid in the prevailing market for handling similarly complex federal litigation.

Regarding the issue presented here—whether attorneys in public interest private practice are restricted to reduced rates they occasionally charge some clients or whether they can be awarded prevailing market rates—all circuits that have ruled on the issue have done so in

a manner consistent with *SOCM*.[26] Regarding whether there are broader issues of alleged circuit conflict about how to calculate a reasonable rate, the District cites *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) (*"SPIRG"*) as "identifying four distinct interpretations" of *Blum* footnote 11, "in the context of awarding fees, under federal fee-shifting statutes, to attorneys with for-profit practices." Petition at 23. The cases cited by the District do not support a current conflict among the circuits.

SPIRG identified four approaches: (1) a billing rate rule (mandating the rate an attorney bills clients); (2) a micro-market rule (emphasizing that rate awarded depends on market rates of comparable attorneys in similar cases); (3) a modified billing rate rule (applying attorney's billing rate plus a contingency enhancement); and (4) a community market rate rule (awarding rates charged by comparable counsel, without regard to attorney's billing rate). *Id.* at 1443-48. Even if these categories ever existed, *Dague* eliminated the modified billing rate (contingency enhancement) rule. *Dague*, 505 U.S. at 567.

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[26] *See Davis v. City and County of San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992) (awarding prevailing market rates exceeding rates charged by plaintiffs' attorneys in private but public interest practices); *SOCM*, 857 F.2d at 1525 (D.C. Cir. 1988) (*en banc*) (permitting recovery of prevailing market rates for privately practicing attorneys who charged clients reduced rates for public interest reasons); *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1442-50 (3d Cir. 1988) (*"SPIRG"*) (awarding for-profit, public interest law firm prevailing community rate higher than rate counsel customarily charged); *Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir. 1987) (upholding award of prevailing market rate in excess of counsel's actual rate), *cert. denied*, 484 U.S. 990 (1987); *Hall v. Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987) (award of prevailing market rate to attorney engaged in private public interest-oriented practice); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983) (award of market rates without regard to public interest attorneys' billing rates not abuse of discretion).

Similarly, no authority currently supports a strict "billing rate rule" (i.e., limiting counsel to actual rate paid by client regardless of any other circumstances). In support of the billing rate rule, *SPIRG* identified the panel decision in *SOCM*, which was overruled seven years ago. The rule adopted *en banc* in *SOCM*, is the same rule affirmed in this case. *SPIRG* also identified *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) as following a billing rate rule, even though *Shakopee* does not adopt a strict billing rate rule. Although *Shakopee* awarded the attorney's current billing rate, it did *not* hold the attorney's actual billing rate should always apply. *Shakopee* expressly contemplated use of prevailing market rates rather than billing rates for certain situations.[27] Consistent with *Blum*, this approach permits consideration of both the attorney's own billing rate and the prevailing community rate, but values the relevance of these two measures differently depending upon the facts of the case. Normally, an attorney's own billing rate is presumptive, but not dispositive, evidence of the rate he or she can command in the relevant market. This presumption can be rebutted, however, if either party demonstrates the prevailing market rate for comparable services differs from the attorney's normal billing rate.[28] Thus, to the extent that counsel has market-based rates, those rates are relevant to the determination of a reasonable rate. To the extent

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[27] *See Shakopee*, 771 F.2d at 1161 (explaining that "[i]n many cases, the attorney's own billing rate will not provide the reliable measure such rates provide in this case where the attorney has hourly rates consistent with those charged in the community and specializes in the area of law which is the subject matter of much of the lawsuit. Absent these characteristics, the court must rely more heavily on prevailing community rates for similar services than on the attorney's own billing rate").

[28] *See Islamic Center of Mississippi v. Starkville*, 876 F.2d 465 (5th Cir. 1989) (describing this approach for calculating reasonable rate).

that counsel, like the public interest counsel in *Blum*, have no market-based rates, counsel's rate is set with reference to prevailing market rates.

All the cases categorized by *SPIRG* as micro-market or community market cases follow this approach. Both the so-called micro-market method and the so-called community market method ensure, as suggested in *Blum*, that the rate awarded is in line with the rates prevailing in the community for attorneys of comparable skill, experience, and reputation, doing similar work. In each case, the court relies on the evidence presented to determine the reasonable hourly rate. What *SPIRG* categorized as the micro-market and community market methods of determining a reasonable rate, really are the same approach applied to cases that defined the relevant market differently. No conflict among the circuits is presented simply because district courts make case-by-case determinations about the makeup of the relevant market.

As in *Shakopee*, the cases *SPIRG* describes as applying the micro-market method, apply the attorney's actual rate, insofar as it is consistent with prevailing (micro) market rates. To the extent that the attorney's actual rate differs from the rate prevailing in the micro-market, the courts consider both the billing rate and the prevailing market rate in that narrow market to determine what rate is reasonable.[29]

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[29] *See Lightfoot v. Walker*, 826 F.2d 516, 523-24 (7th Cir. 1987) (although actual rates were "a starting point," plaintiffs not limited to $70 per hour attorney received in practice in another specialty and geographic region, but could be awarded market rate of $85, based on evidence of rate counsel could command litigating this type of case in geographic region); *Mayson v. Pierce*, 806 F.2d 1556, 1557 (11th Cir. 1987) (affirming minimarket supported by evidence, and affirming award of rate consistent with minimarket but lower than counsel's billing rate); *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986) (market rate applies where court found billing rate exceeded prevailing rate), *cert. denied*, 482 U.S. 914 (1987).

The District has argued in the instant cases that counsel should receive the reduced rates they charge because a submarket exists

The cases applying what *SPIRG* describes as the community market method, are factually different from *Shakopee* and the micro-market cases in that they all involve instances where courts found attorneys reduced their rates for public interest reasons, and therefore have rates lower than those in the market the court finds relevant.[30] Thus, in the community rate cases, courts give less weight to the attorney's actual rate and instead apply the prevailing market rate rather than the rate the attorney charges to clients.

The more recent cases the District cites, in support of its "confusion in the circuits" contention, follow the approach described above. All these cases apply the attorney's actual rate, if consistent with prevailing market rates. If the billing and market rates are inconsistent, the court determines whether the actual billing rate or the prevailing community should be given greater weight, relying on factors such as whether the billing rate or the prevailing market rate is higher, and whether the billing rate reflects a reduction for public interest reasons.[31]

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and counsels' rates are consistent with that submarket. Unlike the so-called micromarket cases cited above, each of the courts in these cases, found there was insufficient evidence that a submarket exists.

[30] *See Davis*, 976 F.2d at 1548; *SOCM*, 857 F.2d at 1525 (D.C. Cir. 1988) (*en banc*); *SPIRG*, 842 F.2d at 1442-50; *Maldonado*, 811 F.2d at 1342; *Hall*, 817 F.2d at 928-29; *White*, 713 F.2d at 461.

[31] *See Beard v. Teska*, 31 F.3d 942, 955-57 (10th Cir. 1994) (where attorney's billing rate exceeded market rate, prevailing market rate should apply); *Casey v. City of Cabool*, 12 F.3d 799, 806 (8th Cir. 1993) (awarding prevailing market rate lower than billing rate); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148-50 (7th Cir. 1993) (remanding fee award based on prevailing market rates because district court failed to give weight to regular billing rates, which were higher than prevailing market rates; evidence indicated billing rates reflected market rate attorneys could command, and billing rates should have applied); *Barrow v. Falck*, 977 F.2d 1100, 1105-06 (7th Cir. 1992) (applying attorney's billing rate when it was lower than prevailing community rates on basis

Blum set forth guidelines suggesting that courts can consider both the customary billing rate and the prevailing market rate to determine what rate is reasonable. *Blum*, 465 U.S. at 495, n.11. *Blum's* broad guidelines give district courts flexibility to accord more weight to an attorney's customary rate in certain situations, and more weight to an attorney's market rate in other situations. The various circuits' affirmance of their district courts' exercise of discretion to address different situations differently does not constitute a conflict in their interpretations of *Blum*.

This Court previously recognized the inappropriateness of micro-managing such discretionary, fact-bound determinations by denying certiorari in *Webb v. Maldonado*, 484 U.S. 990 (1987), on the same issue presented here. In *Webb*, the 9th Circuit upheld an award of a prevailing market rate in excess of counsel's actual rate, but the Supreme Court denied certiorari, even though (prior to the D.C. Circuit's *in banc* decision in *SOCM*) the D.C. Circuit and the 9th Circuit had conflicting rules regarding this precise issue. Now, when the circuit conflict was resolved years ago by *SOCM*, and *Dague* has provided additional guidance about how to calculate rates, there is even greater reason for the Court to deny certiorari.

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that billing rate was rate *this* attorney could command in market, and specifically stating that court did not reach *SOCM* issue because attorney had not alleged that he reduced his rate for public interest reasons); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989) (in light of "meager" evidence to support plaintiffs' contentions regarding the market rate, the fact that evidence in record indicated that attorney's billing rates were consistent with lower end of market, and court's own knowledge of rates charged in community, court awarded rates lower than those plaintiffs requested), *cert. denied*, 496 U.S. 905 (1990); *Islamic Center*, 876 F.2d at 469 (remanding case where court awarded lower rate it held was prevailing in community, without providing rationale for departure from normal billing rate of counsel, which was higher, but within range of community rates established by evidence).

The District also claims there is a conflict within the D.C. Circuit about how to determine a reasonable rate. No such conflict exists,[32] but, even if it did, resolution by the D.C. Circuit would be more appropriate than granting certiorari. The D.C. Circuit's decision to deny rehearing *in banc*, indicates that the D.C. Circuit does not perceive an intracircuit conflict. App. 83-84.

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[32] Contrary to the District's argument, neither *SOCM* nor the instant cases conflict with *Goos v. National Ass'n of Realtors*, 997 F.2d 1565 (D.C. Cir. 1993), or *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994). In *Goos*, plaintiff sought in the district court the hourly rates her attorney charged to "all his clients," and did not allege or offer evidence that her counsel "offered her a discounted rate for altruistic reasons," either customarily, or in that case. *Goos*, 997 F.2d at 1568-69. On appeal, plaintiff sought *Laffey* matrix rates for the first time. *Id.* at 1568. The D.C. Circuit affirmed the district court's rate determination that plaintiff could recover only the rate charged by her attorney ($130-$140) and not the rate "found in the schedule (or matrix) of prevailing community rates adopted in this circuit" ($220-$240). *Id.* at 1568. It relied on the fact that there was no evidence of a below market rate or a rate discounted for altruistic reasons. *Id.* at 1568-69.

Similarly, in *Kattan*, the D.C. Circuit, citing *Blum*, affirmed the determination by Judge Green, (who also decided *Galloway*), of an hourly rate equal to the highest rate in decisions cited to the court and within the range of market rates for similarly experienced counsel contained in plaintiff's own expert's declaration. Kattan did not seek rates higher than those her attorney charged clients, nor did she contend her counsel reduced her rate for altruistic reasons. 995 F.2d at 278-79. There was no discussion in *Kattan* of *SOCM*, the *Laffey* matrix, or a mini or micro market.

The cases the District cites do not support its claim that there is a conflict within the D.C. Circuit about how to determine a reasonable rate. What the cited decisions have in common with these cases is that, in all five instances, the D.C. Circuit affirmed factual findings by the district courts as to a reasonable hourly rate based on the rate evidence submitted, and the skill, experience, and reputation of each counsel.

CONCLUSION

The District seeks to overturn the district courts' discretionary factual findings on reasonable hourly rates, an area that is well-suited to the exercise of broad judicial discretion. The Court of Appeals' decision is consistent with previous decisions of this Court and presents no conflict with other Circuits. This Court should deny the Petition for a Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.
DARRYL COVINGTON, *et al.*,
Respondents.

Reply to Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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DISTRICT OF COLUMBIA, *et al.*,
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Reply to Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

This case raises fundamental questions concerning what legal standards should apply in calculating hourly rates in federal fee-shifting litigation. The important context in which these questions arise is that of private, for-profit attorneys who seek rates in excess of those they have ever been able to command in the marketplace. The Circuits have adopted conflicting legal standards to resolve these questions. The D.C. Circuit has adopted the most generous standards in the country -- *Laffey* matrix or no *Laffey* matrix. Unlike the other Circuits, it permits such hourly rates to be awarded merely because other counsel in other sorts of cases command such rates in the marketplace and because counsel state that they have charged lower rates for public-spirited reasons. The D.C. Circuit thus permits above-market rates to be awarded, rates which are indistinguishable from prohibited contingency enhancements.

In this Reply, the District first addresses certain factual inaccuracies in the Opposition, but this should not obscure the fundamental legal issues presented by this Petition. It then addresses the serious conflict among the Circuits on these issues and the conflict between the decision below and the decisions of this Court.

I. *LAFFEY*-MATRIX RATES ARE PREMIUM RATES.

Respondents urge that the District of Columbia is mistaken in its argument that *Laffey*-matrix rates are premium rates for three reasons: (1) the district court in *Laffey* did not award the very highest rates charged by some attorneys in the District; (2) *Laffey*-matrix rates have routinely been awarded by courts in the District; and (3) the rates in the matrix are lower than those charged by lead defense counsel in several investigations under the Ethics in Government Act. See Opp. 3-5. These criticisms are unfounded.

First, it was the district court in *Laffey* which underscored that the matrix rates were premium rates to be awarded only to counsel of superior skill and reputation. Not only did that court characterize lead counsel in that case as attorneys of "extraordinary experience and expertise" and the *Laffey*-matrix rates as "generous" even for them, but when a *Laffey* attorney was not a luminary, it reduced the matrix rate by *one-third*. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 374 (D.D.C. 1983).

Second, the fact that trial courts in the District recently have been routinely awarding *Laffey*-matrix rates upon request does not prove that these rates are market rates for attorneys like those here, rather than premium rates. What it does prove is that, contrary to respondents' arguments elsewhere in their Opposition, the *Laffey* matrix has become not merely the starting point for determining hourly rates in federal fee-shifting litigation, but the only point.

Third, the Ethics in Government Act cases cited by respondents, in which lead counsel were awarded rates higher than *Laffey*-matrix rates, are easily distinguishable. Those attorneys are widely regarded not merely as legal luminaries but as "supernovas," and they were engaged in representing the highest officials of this country in very high-stakes criminal cases. One cannot reasonably compare counsel and the cases here with Theodore Olson, who represented former White House Chief of Staff Donald T. Regan in *In re North (Regan Fee Application)*, 1995 U.S. App. LEXIS 36364 (D.C. Cir. Dec. 22, 1995)); with Griffin Bell, who represented

President Bush in *In re North (Bush Fee Application)*, 59 F.3d 184 (D.C. Cir. 1995); or with Lloyd Cutler, who represented former Secretary of State George P. Shultz in *In re North (Shultz Fee Application)*, 8 F.3d 847 (D.C. Cir. 1993). Nor can one infer from the hourly rates awarded to these extraordinary attorneys ($400.00, $337.50, and $370.00) in these extraordinary criminal investigations that the *Laffey*-matrix rates awarded to lead counsel here ($260.00) are merely mid-range rates, as respondents contend (Opp. 3).

II. The Fee Awards Here Rest On The *Laffey* Matrix Which Has Been Rigidly Applied By Courts In The District Of Columbia In Recent Cases.

Respondents urge that the courts in the District of Columbia have not in recent cases been rigidly applying the *Laffey* matrix. They also urge that the District's market-rate evidence was properly ignored because it addresses fees charged by solo practitioners and small firms in cases like these and because two of its examples were outdated. Neither argument has merit.

The first argument is belied by respondents' own presentation of the facts. Thus, in their page-long footnote 3 (Opp. 3-4), which they proffer in an attempt to reassure this Court that the *Laffey* matrix must be reasonable because it has been widely accepted, they list some 11 cases in which the matrix has been mechanically applied. Furthermore, in their 12-bullet-point discussion of the so-called extensive evidence in *Covington* (Opp. 8-9), 11 of these points are based on the *Laffey* matrix or one of its updates.[1] Finally, in support of their argument that "district courts have demonstrated that they will not award matrix rates to attorneys they believe could not command such rates in the market," (Opp. 20) respondents cite only one case -- the original *Laffey* decision!

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[1]The only non-*Laffey*-matrix evidence cited is "A Sampler of Law Firm Billing Rates," published by the *Legal Times*, which contains hourly rate information for 1989, 1990, and 1991 for lawyers at 12 large law firms in the District. Opp. 9. In this sampler, rates ranged from $165.00 to $420.00 for partners. J.A. (I) 184. Given this data base, the sampler cannot possibly be evidence that the time of a solo practitioner or a partner in a small firm, who charges, for example, a maximum hourly rate of $150.00, has a true market value of $260.00 per hour.

The second argument is belied by respondents' own evidence. Thus, prevailing counsel here were all attorneys in small firms or solo practitioners and, as a consequence, there is no need to discount evidence of what such attorneys charge in cases like those here. Furthermore, evidence of contemporaneous market rates for Mr. Bennett and Mr. Adler, with practices similar to counsel here, *was supplied by the respondents themselves*. They submitted a 1991 affidavit by Mr. Bennett (and identical affidavits by three other attorneys) in which he averred that "[i]t is common for law firms to raise their rates at least $10 per year" and "[t]hat has certainly been the case for my law practice." J.A. (I)141-42.[2] If $10.00 per hour is added to Messrs. Bennett's and Adler's market-based 1987 hourly rate of $135.00, their market-based rate for 1992 would have been $185.00. The applicable *Laffey*-matrix rates would have been either $290.00 or $300.00 for Mr. Adler, and either those rates or $250.00 or $260.00, for Mr. Bennett. See Pet. 8 n.2.

III. There Is A Conflict Among The Circuits Over The Meaning of *Blum's* Footnote 11.

Respondents assert that the District, as well as the Third Circuit, errs in stating that there is a conflict among the Circuits over how to interpret *Blum's* footnote 11 (*Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)) and that all the decisions cited in its Petition, as well as in *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) ("*SPIRG*"), "used the same method to determine lodestar fees." Opp. 23. For the reasons that follow, these assertions are wrong. Thus, the decision below is squarely in conflict with *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992); *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); and *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992).

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[2]Mr. Bennett's affidavit, and the three identical affidavits, persuaded the district court in *Robles v. United States*, Civil Action No. 84-3585, 1992 U.S. Dist. LEXIS 142 (D.D.C. Jan. 10, 1992), to increase the *Laffey*-matrix rates by $10.00 annually. J.A. (I) 131 & 134 n.7.

Here, for example, in the *Covington* case, lead counsel, whose customary hourly rates have never exceeded $150.00, were awarded $260.00 based on evidence that some other attorneys with 11 to 19 years of experience may charge that higher rate in other types of cases. Neither the Seventh nor the Eighth Circuit would have permitted this award. To paraphrase Judge Easterbrook in *Barrow*: "Perhaps *other* attorneys . . . have market rates in the range of $260.00; rates vary with the skill and the time a lawyer needs to accomplish a task. But *the attorneys representing the Covington plaintiffs* had a market rate of $150.00 or less." 977 F.2d at 1105. In *Shakopee*, in turn, the Eighth Circuit reversed an hourly rate of $100.00, despite evidence that other attorneys charged between $100.00 to $125.00, and awarded $70.00, which constituted the attorney's own customary rate and thus "represent[ed] counsel's own valuation of his work," and which was also "comparable to general rates charged for similar work . . .." 771 F.2d at 1160.[3]

The decision below is also in conflict with *Davis* (and numerous other cases) in rejecting the common sense proposition that the market for legal services, especially the market in major metropolitan areas, contains specialties or submarkets, including a civil rights plaintiffs bar. Indeed, in *Davis*, the Ninth Circuit ruled insignificant an hourly-rate survey, similar to that in *Laffey*, "which discussed a wide variety of practice areas." 976 F.2d at 1547. *Davis* is also inconsistent with *Barrow* insofar as it awarded fees at rates charged by attorneys other than the prevailing attorneys in the case.

The conflict among the Circuits can be illustrated in a slightly different context -- that in which prevailing counsel seek their customary rates and defendants urge that these rates are higher than market rates. The Seventh Circuit has adopted an opportunity-cost approach in which counsel are ordinarily entitled to their customary

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[3]The depth of the conflict among the Circuits is illustrated by the fact that in *Shakopee*, the Eighth Circuit expressly followed the D.C. Circuit's billing-rate, or opportunity-cost, approach in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), an approach which was overturned by the Circuit *en banc* in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. 1988) ("*SOCM*").

rates. *See, e.g., Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) (reversing award of hourly rates less than counsel's customary rates, which had been set because few persons would be willing to pay $275.00 per hour to recover $1,000.00, because, "[i]n order to encourage able counsel to undertake" cases under Fair Debt Collection Practices Act, "as congress intended, it is necessary that counsel be awarded fees commensurate with those which *they could obtain by taking other types of cases*") (emphasis added); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) (remanding case in which district court had declined to award customary rate; ruling that an attorney's opportunity cost is his presumptive market rate; and stating that a rate lower than an attorney's customary rate is proper only if an attorney's "market-clearing price" is less than that rate). By contrast, the Tenth Circuit has adopted a common sense submarket approach in which an attorney is not entitled to his customary rate if it exceeds the rate charged by counsel in similar cases. *See Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994) (attorney who can command $200.00 per hour in his general civil rights litigation practice is entitled to only $125.00 per hour in a case brought under the Individuals with Disabilities Education Act because the lower rate is the rate charged by comparable counsel in IDEA litigation and thus is the market rate in IDEA cases).

In short, there is a square conflict among the Circuits over the *legal standards* to be used in determining the market rates to be awarded prevailing counsel in federal fee-shifting litigation. And, although this Court in *City of Burlington v. Dague*, 505 U.S. 557 (1992), eliminated one of the four approaches identified by the Third Circuit in *SPIRG*, at least three others remain. *See* Pet. 23-30; *see also* AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 20-21 & n.92, Federal Judicial Center (1994) (noting conflict between Seventh and Ninth Circuits and Seventh Circuit's disagreement with *SOCM*).

IV. THE DECISION BELOW IS IN CONFLICT WITH *BLUM* AND *DAGUE* BECAUSE IT DOES NOT REFLECT THE MARKET AND RESULTS IN WINDFALLS FOR ATTORNEYS.

In *Blum, Dague*, and its other federal fee-shifting cases, this Court has attempted to chart a reasonable and steady course in

rather choppy waters. It has recognized that federal fee-shifting statutes radically alter the marketplace for legal services by enabling persons with meritorious claims to secure counsel they otherwise would not, or could not. At the same time, however, it has sought to craft rules that otherwise reflect the market; do not generate excessive fee litigation; and result in fee awards that are adequate to attract competent counsel but do not result in windfalls to attorneys. These purposes are sometimes at odds with each other. Thus, for example, although counsel representing clients in non-fee-shifting litigation on a contingent-fee basis may command a premium for their services above their customary hourly rates, this Court in *Dague* ruled that contingency enhancements in fee-shifting litigation would more often distort the market for legal services rather than reflect it.

Footnote 11 in *Blum* constitutes this Court's initial -- and so far only -- attempt to provide guidance on the important issue of how to calculate a reasonable hourly rate for the lodestar in cases brought under federal fee-shifting statutes. Footnote 11, when read in light of the purposes of these statutes and the policies this Court has identified as important in interpreting them, requires the conclusion that the decision below is wrong. Thus, although the decision may promote fee simplification, it distorts the market for legal services and results in fee awards well in excess of those necessary to attract competent counsel.

In footnote 11, this Court recognized that hourly rates vary widely because of market forces, which take into account the fact that the experience, skills, and reputations of attorneys vary widely. This Court also recognized that the customary rate or rates charged by attorneys are presumptively their market rates. As applied here, footnote 11 required only a rather simple inquiry. In *Covington*, for example, the highest customary hourly rate of lead counsel was $150.00 and this rate was in line with rates charged by comparable counsel in similar cases. *See* Pet. 7-8 & n.2. It was thus lead counsel's market rate.

Nevertheless, the D.C. Circuit awarded an hourly rate of $260.00 based on the *Laffey* matrix. The D.C. Circuit did so even though the *Laffey* matrix treats all attorneys in the District with 11

to 19 years of experience as fungible and even though it was designed to help establish market rates for counsel of superior skill and reputation in a particularly complex class action. And the D.C. Circuit did so even though counsel in the three cases before it had never commanded *Laffey*-matrix rates in the marketplace and even though their clients could have secured (and, in fact, did secure in *Sexcius*) counsel at rates much lower than *Laffey*-matrix rates.

The D.C. Circuit's decision ignores two basic principles. First, the purposes of federal fee-shifting statutes do not include ensuring that attorneys litigating cases under them receive hourly rates that are comparable to those garnered by attorneys at prestigious firms. Second, a competitive market, including a competitive market for legal services, should exert downward, not upward, pressures on price. The result of the D.C. Circuit's decision is a windfall for attorneys at the expense of the public.

This can be illustrated by two examples. The first example comes from the recent law school graduates employed by Messrs. Gaffney and Schember, lead counsel in *Covington* and principals in the firm of Gaffney & Schember. For their time, the firm paid these graduates $11.00 per hour; billed clients at a rate of $40.00; and was awarded fees at a rate of $85.00. See J.A. (I)16, 18 & 226. The $85.00 rate awarded by the trial court plainly generated a windfall for the firm even if one makes the (implausible) assumption that the $40.00 rate it charged clients for their time just covered its costs for these employees. For example, if the recent law school graduates billed 2,000 hours in 1992 in successful fee-shifting litigation, they would have generated a profit of $90,000.00 for Gaffney & Schember, or $45,000.00 per partner.

The second example assumes that Messrs. Gaffney and Schember billed 35 hours per week for 48 weeks in 1992 (1,680 hours each); that half their practice was for paying clients at their highest hourly rate of $150.00; and that the other half was fully contingent litigation under federal fee-shifting statutes. The gross annual revenues generated by these attorneys from fee-paying clients would have been $252,000.00. Their fee-shifting litigation, assuming success and a court-awarded hourly rate of $260.00, would have generated gross revenues of $436,800.00, or $184,800.00 more than

their gross revenues from fee-paying clients. Presumably, moreover, these additional revenues would represent pure profit.

These examples illustrate three points. First, hourly rates based on the *Laffey* matrix to attorneys like those in this case -- which apply only when losing defendants are paying -- look just like contingency enhancements. Such enhancements are, however, barred by *Dague*; and they are no more permissible even when they are disguised as so-called market rates. Second, using the *Laffey* matrix to determine fee awards in the across-the-board fashion employed here is a legislative decision that skews the market for legal services. Third, the *Laffey* matrix results in awards that are unreasonably and unfairly high. Such rates cannot therefore be imposed when the public is responsible for picking up the bill.[4]

V. Tentative Proposed Standards.

The District tentatively proposes the following standards for implementing footnote 11 of *Blum*. An attorney's customary rate should presumptively be his or her reasonable hourly rate in federal fee-shifting litigation so long as that rate is within the range charged by attorneys of comparable experience, skill, and reputation in similar cases. If an attorney seeks a higher rate, he bears a heavy burden of establishing that his customary rate is truly a below-market rate, a burden that was not met in the cases before this Court. If an attorney's customary rate is higher than the rate charged by attorneys of comparable experience, skill, and reputation in similar cases, the lower rate presumptively should be awarded. This is consistent with market practices: purchasers of legal services seek the lowest price consistent with adequate representation. Or to paraphrase Judge Shadur in *Beard v. Teska, supra*, because cost-conscious consumers do not hire corporate merger specialists for their house closing, prevailing plaintiffs in federal fee-shifting litigation are not entitled to recover fees at premium rates in cases not demanding premium representation.

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[4]In *Covington*, for example, the merits litigation resulted in 1,729 compensable hours. See Pet. App. 47.

CONCLUSION

There is a square conflict among the Circuits over the legal standards that govern the setting of hourly rates under nearly 200 federal fee-shifting statutes. This is an important conflict that should be resolved by this Court to ensure that these federal laws are uniformly applied throughout the country and that the hard-pressed public is not forced to pay windfalls to attorneys.[5]

Respectfully submitted,

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[5]There is one final matter. Respondents suggest that the District waived any submarket argument below. Opp. 18 n.17. They are wrong. First, the District vigorously urged below that counsels' market rates could not exceed their customary rates because these were the rates they were able to command in the market and in line with the rates charged by comparable counsel in similar cases. Second, the D.C. Circuit acknowledged (and rejected) that argument: "Finally, the District argues that the court should define the relevant market . . . narrowly, as including only plaintiff attorneys in civil rights, employment, or discrimination actions." Pet. App. 20. Third, this Court has ruled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992). Here, the District properly presented the claim that the market rates for counsel here may not exceed their customary rates.